[redacted] COURT, U. S.

# [redacted] OF RECORD

[redacted] OF THE UNITED STATES

[redacted] Term, 1958

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[redacted] No. 366

[redacted] PETITIONER,

v.

[redacted] DAM AUTHORITY

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[redacted] THE UNITED STATES COURT OF CLAIMS

[redacted] October 24, 1958

[redacted] November 24, 1958

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1959

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No. 503

## UNITED STATES, PETITIONER,

vs.

## GRAND RIVER DAM AUTHORITY

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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[fol. a]

# IN THE UNITED STATES COURT OF CLAIMS

No. 226-56

GRAND RIVER DAM AUTHORITY, a Public Corporation, and an Agency of the State of Oklahoma, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed May 28, 1956

To the Honorable, the United States Court of Claims:

The plaintiff respectfully represents to the Court of Claims as follows:

1. The plaintiff, the Grand River Dam Authority (herein referred to as "Authority"), is a public corporation organized and existing under and by virtue of Article 4, Chapter 70, Session Laws of Oklahoma 1935, as amended and supplemented. Chapter 8, Title 82, Okla. Statutes 1951.) That it is a governmental agency, body politic and corporate with powers of government and with authority to exercise certain privileges and functions, among which are the following: To control, store, preserve, sell and distribute waters of Grand River and its tributaries for the purpose of irrigating arid, semi-arid and other lands and conserving and developing the forest and generating hydro electric power of the State of Oklahoma, to acquire by purchase, lease, gift or in any other manner, and to maintain, use and operate any and all property of any kind, real, personal or mixed, or any interest therein necessary or [fol. b] convenient to the exercise of the powers, rights, privileges and functions conferred and enjoined upon it by said Act.

2. The United States is sued herein on claim founded upon the Fifth and Tenth Amendments to the Constitution of the United States, as authorized by Section 1491 of Title 28, U. S. Code.

3. That the Grand River and its tributaries are non-navigable waters of the State of Oklahoma; and, the State of Oklahoma, by said Act creating the Grand River Dam

Authority, granted to and vested in the Authority all of the beneficial water rights in Grand River and its tributaries, and granted to and vested in the Authority the exclusive franchise, right and privilege to develop all of the water power in Grand River and its tributaries, and is now, and has been at all times mentioned herein, the sole and exclusive owner of said water and franchise rights.

4. That said Act specifically empowered and authorized the Authority to construct on Grand River in Oklahoma, the Pensacola, Markham Ferry and Fort Gibson Dams and power projects for the purpose of developing, generating and distributing hydro electric power and for other useful purposes.

5. The Authority, soon after its creation and organization, prpared and initiated a comprehensive plan to control, store and preserve the waters of Grand River and its tributaries in Oklahoma for the purpose of making beneficial use of the waters of Grand River and its tributaries for the development and generation of electric power and energy for sale and distribution and for other beneficial purposes, as shown by map hereto attached, marked Exhibit "A," and made a part hereof. Said plan and program provided that the system consist of three hydro elec- [fol. c] tric generating units, that is, the Pensacola, Markham Ferry and Fort Gibson generating units, which were to be constructed, operated and maintained as one system and unified project. Said plans called for the construction of said generating units in the following order: First, Pensacola, second, the Markham Ferry and Fort Gibson units. The Pensacola unit being the headwater unit, the Authority designed and constructed this unit to provide for storage and other headwater improvements for use and utilization at the Markham Ferry and Fort Gibson units, there being no power storage in either the Markham Ferry or Fort Gibson units. Under this plan, the Authority could use the waters stored in the Pensacola unit three times for the generation of electric power and energy.

6. The Authority completed the construction of the Pensacola unit in 1940 with a storage capacity of approximately 1,680,000 acre-feet at a maximum power pool elevation of 745 feet above mean sea level, with an additional storage for flood control of approximately 520,000 acre-feet

at elevation 755 above mean sea level, and a hydro power plant with an initial installation of 80,000 kilowatts, which has since been increased to 90,000 kilowatts. The Authority also acquired lands, easements and rights-of-way and constructed transmission lines, substations and facilities for the connection and integration of the Pensacola unit with the Markham Ferry and Fort Gibson units, and had surveys, plans and specifications made for the construction of the Markham Ferry and Fort Gibson units.

7. That the Seventy-seventh Congress, First Session, by Public Law No. 228, approved on the 18th day of August, 1941, an Act known as the "1941 Flood Control Act," (55 Stat. 638), and authorized the construction of the Pensacola, [fol. d] Markham Ferry and Fort Gibson Dams and reservoir projects for the production and generation of electric power and energy, under the direction of the Secretary of War. That said Flood Control Act of 1941 was passed and approved by the Congress after the Authority had completed and placed in operation the Pensacola unit, and after it had acquired lands, easements, rights-of-way and had constructed transmission lines, substations and facilities to connect and integrate the Pensacola unit with the Markham Ferry and Fort Gibson units, and after the Authority had made the surveys, plans and specifications for the construction of the Markham Ferry and Fort Gibson units.

8. That the United States, acting through the Secretary of the Army, has constructed the Fort Gibson power project on Grand River approximately 50 miles below the plaintiff's Pensacola project and near the plaintiff's Fort Gibson dam site, with a present installed generating capacity of approximately 49,000 kilowatts with provisions to add an additional 25,000 kilowatts at some future date. That the bottom of the power pool in the defendant's Fort Gibson power project is at elevation of 551 above mean sea level and the top of the power pool is at 554 above mean sea level. That the storage between elevation 554 and 582 is reserved for the control of flood waters. That the defendant's Fort Gibson power project, as constructed and operated, is incapable of producing any firm electric power and energy without the use of the plaintiff's water power, storage and headwater improvements at the Pensacola unit. That through the use of the Authority's water power and

the use of the storage and headwater improvements in the Pensacola unit, the defendant is able and can produce at its Fort Gibson power project approximately 94,600,000 kilowatt hours of firm energy per year.

[fol. e] 9. That on or about the 30th day of March, 1953, the defendant, the United States, appropriated, took and converted to its exclusive possession and use for the production of electric power and energy the plaintiff's franchise to develop, generate and sell electric power and energy from Grand River and its tributaries at the Fort Gibson site; and, appropriated, took and converted to its exclusive possession all of the plaintiff's water power rights in Grand River and its tributaries at the Fort Gibson site; and, appropriated, took and converted to its possession and use the storage and headwater benefits of the plaintiff's Pensacola unit to the Fort Gibson unit, all without the consent and approval of the plaintiff. That the defendant from and after the time of said appropriation and taking has exercised complete control of said property excluding the plaintiff from any and all control or use thereof.

10. That by reason of said taking by the defendant, the plaintiff has suffered loss of an integral part of its hydro electric generating system, the loss of its franchise to generate and develop electric power and energy at the Fort Gibson unit, loss of its water power rights at the Fort Gibson unit and the loss of the value of the storage and headwater improvements in the Pensacola unit, to the extent that the same is useful and beneficial to the Fort Gibson unit. That it has lost the costs that were expended in surveys, plans and specifications for the Fort Gibson unit, and by said taking and the severance of the Fort Gibson unit from the remainder of the plaintiff's system it has suffered damage to the remainder of its system.

11. That the plaintiff filed with the Secretary of the Army of the United States a claim in the amount of Ten Million Dollars ($10,000,000.00) in respect of said property appro- [fol. f] priated and taken, which claim was denied by the Secretary of the Army.

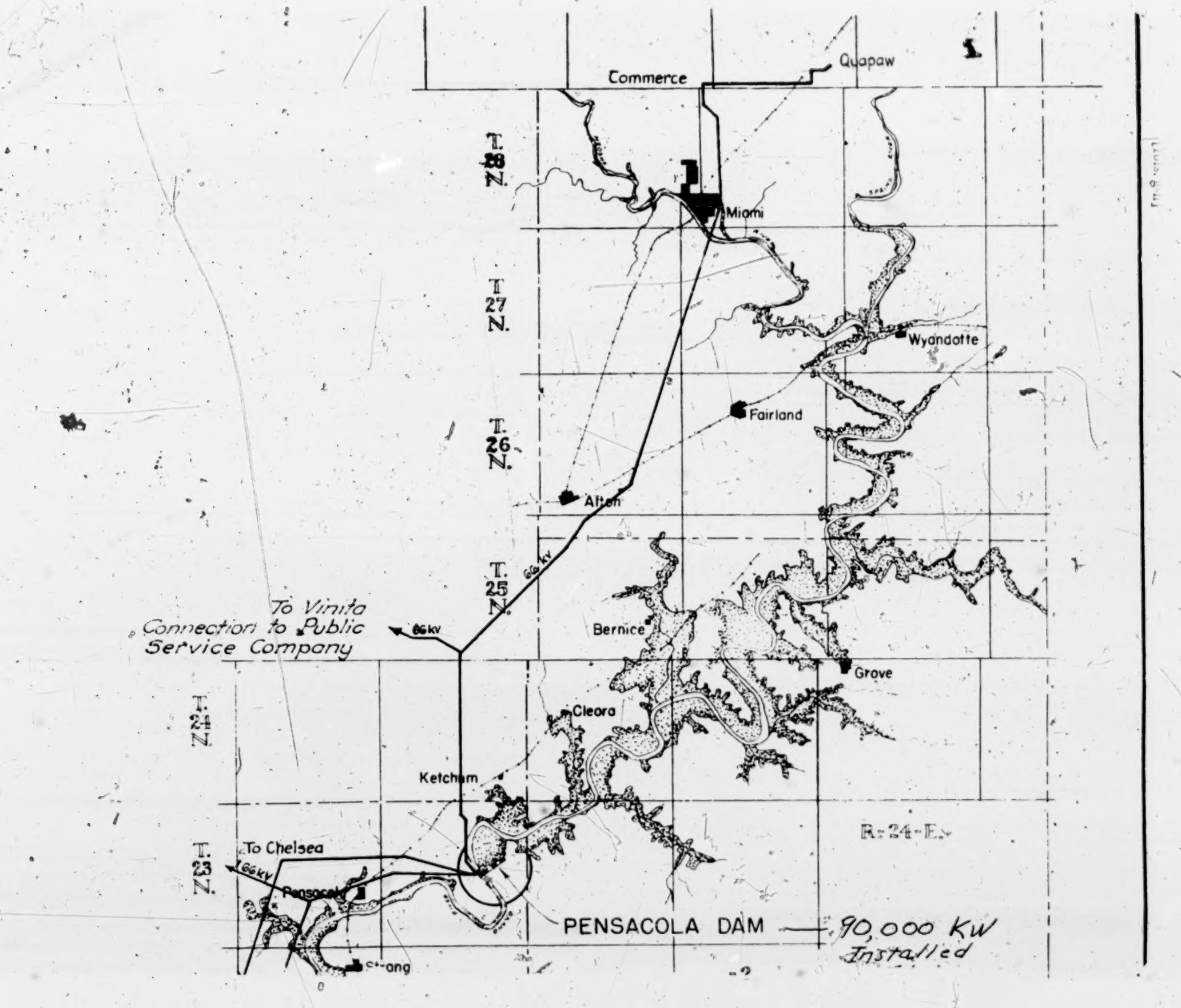
12. No action on said claim has been taken by Congress or by any department other than as set forth in paragraph 11 herein.

13. Plaintiff is the sole owner of said claim and has made no transfer or assignment of said claim or any part thereof.

14. By reason of the foregoing, plaintiff claims the sum of Ten Million Dollars ($10,000,000.00), plus an amount equivalent to interest at the rate of 6% per annum of said sum, from the 30th day of March, 1953, the date the defendant appropriated and took said property, to the date of entry of judgment herein under the provisions of the Fifth and Tenth Amendments to the Constitution of the United States, as fair and just compensation for the property appropriated and taken, and as damage to the remainder of the plaintiff's property not taken.

Wherefore, the plaintiff prays judgment against the United States in the sum of Ten Million Dollars ($10,000,000.00), together with an amount equivalent to interest at the rate of 6% per annum thereon from the 30th day of March, 1953, to the date of entry of judgment herein, and for such other and further relief as may be proper.

Q. B. Boydstun, P.O. Drawer 912, Vinita, Oklahoma,
Attorney for Plaintiff.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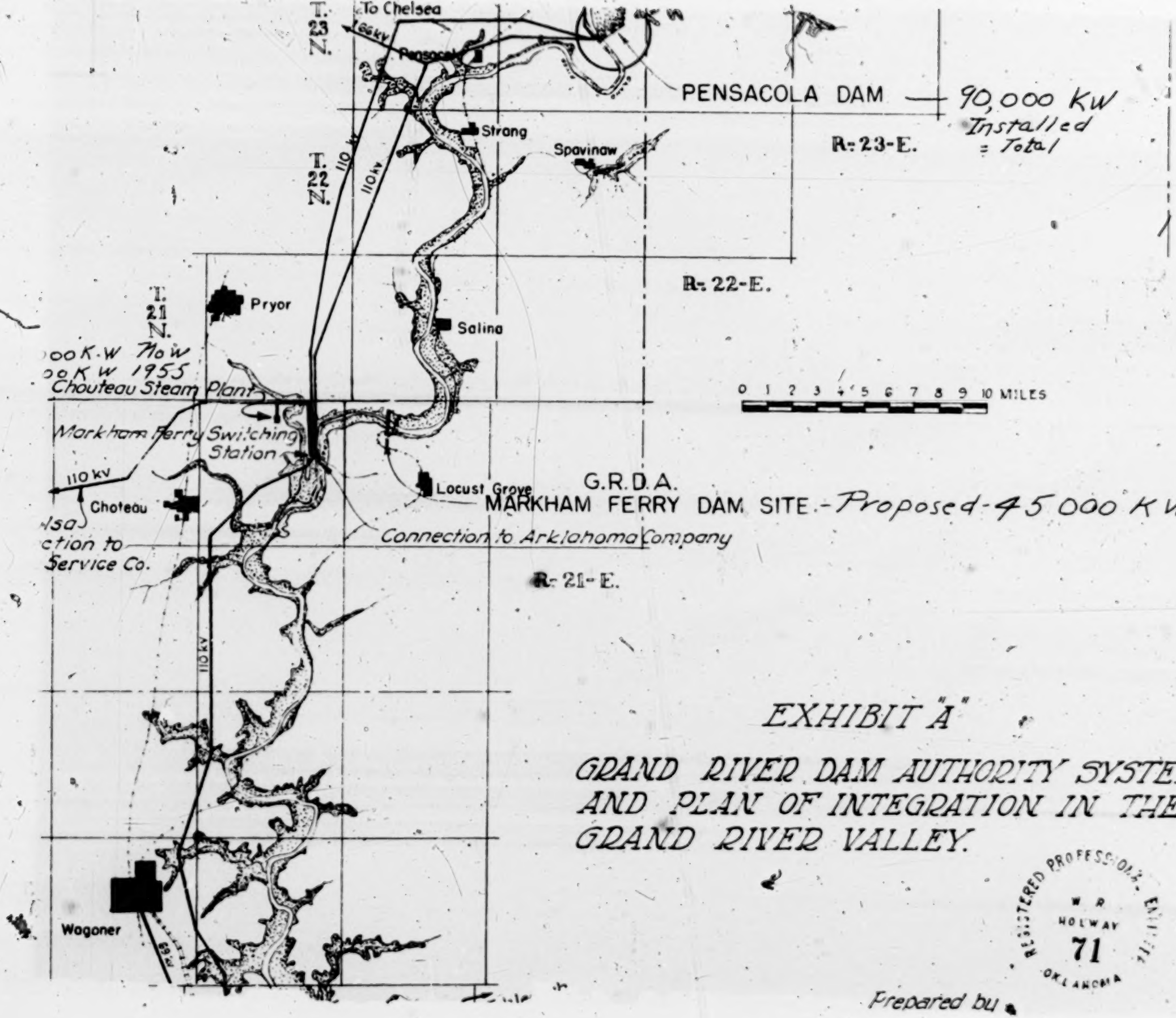


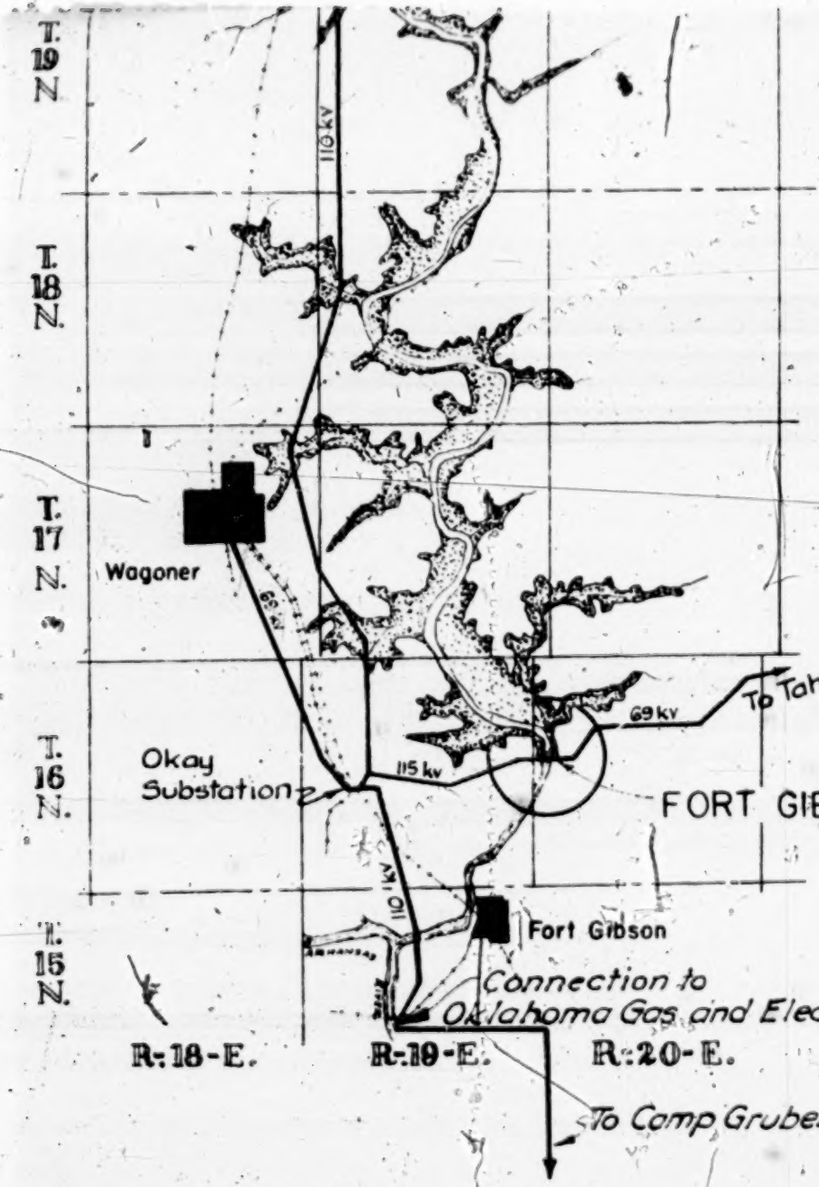

# EXHIBIT "A"

## GRAND RIVER DAM AUTHORITY SYSTEM AND PLAN OF INTEGRATION IN THE GRAND RIVER VALLEY.

REGISTERED PROFESSIONAL ENGINEER
W. R. HOLWAY
71
OKLAHOMA

Prepared by

EXHIBIT A TO PETITION




# EXHIBIT "A"

## GRAND RIVER DAM AUTHORITY SYSTEM AND PLAN OF INTEGRATION IN THE GRAND RIVER VALLEY.

REGISTERED PROFESSIONAL ENGINEER
W. R. HOLWAY
71
OKLAHOMA

Prepared by
W. R. Holway, Consulting Engineer.

Reg. No. MF-P 200

[fol. i] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ANSWER—Filed September 7, 1956

The United States of America, by Perry W. Morton, Assistant Attorney General, for answer to the plaintiff's petition, respectfully shows:

First Defense

The petition fails to state a claim for which relief can be granted.

Second Defense

For its second defense, the defendant shows:

1. The defendant admits the allegations in paragraph 1 of the petition, except

(a) the defendant denies that the plaintiff was granted the exclusive right to use, distribute and sell the waters of the Grand River and its tributaries, but that the authority conferred upon the plaintiff by the State of Oklahoma to use, distribute or sell the waters [fol. j] of that river was made subject to the proviso that any municipal corporation within the area included within the jurisdiction of the plaintiff shall be entitled to take water from the Grand River or any of its tributaries in any quantities as may be needed by such municipal corporation, without payment of any fees or charges for such water;

(b) the defendant denies the allegation in paragraph 1 which purports to recite the extent of the power conferred upon the plaintiff to acquire, use and operate property. Defendant asserts that the recital omits a provision of the state statute, as amended and supplemented. That statute conferred upon the plaintiff the power to purchase, lease and maintain, use and operate any and all property or any interest therein, necessary or convenient to the exercise of the rights, privileges and functions conferred upon the plaintiff, as alleged, but also directs that the plaintiff:

> * * * own, construct, operate and maintain any property or works in conjunction or jointly with any other department or agency of the State of Oklahoma or the United States of America, or any department or agency thereof, within the boundaries of the District * * *

The defendant asserts further that the State of Oklahoma, in authorizing the development of the Grand River, contemplated that such development would be carried out jointly with the United States of America and in fact has been so carried out;

(c) the defendant asserts that although the plaintiff was authorized to acquire and operate property, all as alleged in the state statute cited, the plaintiff [fol. k] had no privileges and functions "enjoined upon it" by the state legislature.

2. Paragraph 2 of the petition states a conclusion which requires no answer.

3. The defendant admits that the Grand River and its tributaries are non-navigable waters of the State of Oklahoma but asserts that while, with the exception of its lower two miles, it was not generally considered a navigable stream, the matter of licensing the power operations is vested in the Federal Power Commission. The defendant specifically denies that the State of Oklahoma, by the act creating the Grand River Dam Authority, granted to and vested in the Authority all of the beneficial water rights in the Grand River and its tributaries. The defendant denies further that the plaintiff has acquired ownership of all of the beneficial water rights in the Grand River and its tributaries and denies that the State of Oklahoma granted to and vested in the Authority the exclusive franchise, right and privilege to develop all of the water power in the Grand River and its tributaries. The defendant also denies that the plaintiff is now and has been at all times mentioned in the petition the sole and exclusive owner of said water and franchise rights.

4. While under the act of the state legislature which created the plaintiff Authority, the plaintiff had the power to build the three dams mentioned in paragraph 1, the Au-

thority was not specifically directed to construct any particular dams.

5. The defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the [fol. 1] allegations in paragraph 5 and those allegations therefore are denied.

6. The defendant admits the allegations in paragraph 6.

7. The defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations regarding the date and extent of the acquisition of lands, easements, rights-of-way and the construction of transmission lines, substations and facilities, and those allegations therefore are denied. The remaining allegations are admitted, except that the defendant asserts that the Flood Control Act of 1941, 55 Stat. 638, modified the Flood Control Act of 1938, 52 Stat. 1215,

> * * * to include the reservoirs in the Grand (Neosho) River Basin, in accordance with the recommendations of the Chief of Engineers in House Document No. 107 * * * of the Seventy-sixth Congress * * *.

The defendant alleges that House Document No. 107 did include the Pensacola, Markham Ferry and Fort Gibson Dams, but that by the time of the passage of the Act of 1941, the Pensacola Dam had already been constructed by the Grand River Dam Authority in 1940.

8. The defendant admits the allegations in paragraph 8, except

> (a) the allegation that the Fort Gibson Dam and Reservoir as constructed and operated is incapable of producing any firm electric power and energy without use of the Grand River Dam Authority's water power, storage and headwater improvements at the Pensacola [fol. m] unit is denied. The defendant asserts that even if the Pensacola unit did not exist, the Fort Gibson Dam and Reservoir would produce 10,700,000 kilowatt-hours of firm energy per year;
>
> (b) the defendant denies the allegation that through the use of the plaintiff's water power and the use of the storage and headwater improvements in the Pensacola unit, the Government is able and can produce at

its Fort Gibson power project approximately 94,600,000 kilowatt-hours of firm energy per year.

9. The allegations in paragraph 9 constitute conclusions of law which require no answer. Those allegations therefore are denied.

10. The allegations in paragraph 10 constitute conclusions of law which require no answer. Those allegations therefore are denied.

11. The defendant admits that by letter dated March 30, 1956, the plaintiff requested the Secretary of the Army to pay to it $10,000,000 and that the Assistant Secretary of the Army, by letter dated April 23, 1956, informed the plaintiff that the records of that Department indicate that all real property or interests therein taken for the Fort Gibson project have been acquired or are in the process of acquisition through purchase agreements or condemnation proceedings. The claim has not been allowed by the Department of the Army.

12, 13. The defendant is without information sufficient to form a belief as to the truth or falsity of the allegations in paragraphs 12 and 13 and those allegations therefore are denied.

14. The defendant denies the allegations in paragraph 14.

[fol. 11] Third Defense

For its third defense, the defendant alleges:

15. The plaintiff constructed its Pensacola unit during the period 1938 to 1941. The construction of the plaintiff's dam was financed beginning in September 1937 by the Public Works Administration, then an administrative branch of the United States Government. The construction of that dam was financed by a loan originally of $11,563,000 and a grant originally of $8,437,000. Those amounts were later increased and the defendant granted to the plaintiff $10,240,000 and loaned to the plaintiff a total of $12,510,000 for the construction of the plaintiff's Pensacola Dam.

16. The operation of plaintiff's Pensacola Dam was licensed by the Federal Power Commission, another agency of the defendant, effective January 1, 1939. On November 19, 1941, pursuant to Executive Order 8944, 6 Fed. Reg.

5947, possession of the dam was taken over by the Federal Works Administration, a federal agency. Possession of the dam was thereafter transferred to the Department of the Interior and to the Southwestern Power Administration under authority of Executive Orders 9366 and 9373, and by order of the Secretary of the Interior. Power from the dam was used in connection with national defense and the dam was returned to the Grand River Dam Authority on September 1, 1946, by presidential order.

17. Pursuant to a declaration of policy by the Congress of the United States in 1936, the Corps of Engineers of the Department of the Army conducted an investigation to determine the advisability of the construction of three dams [fol. 6] along the Grand River at Pensacola, Markham Ferry and Fort Gibson. On June 7, 1937, after public notice, a public hearing was held at Vinita, Oklahoma, called by the Corps of Engineers. The meeting was attended by various interested corporations, associations, private citizens and officials of the State of Oklahoma and several Oklahoma state agencies, including representatives of the Grand River Dam Authority, the plaintiff in this action.

18. At that meeting on June 7, 1937, the proposals for the construction of the three dams by the United States were explained by representatives of the Department of the Army.

19. At that meeting on June 7, 1937, Mr. George Shaefer, Chairman of the Grand River Dam Authority, read and filed a statement advising the Department of the Army that

> The Grand River Dam Authority is ready to assume its responsibility. With the power given it by the Oklahoma State Legislature we can and will issue bonds to carry out the part of the program as required by the United States Government.
>
> a. Provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the projects, i.e. Pensacola, Markham Ferry, and Ft. Gibson Dams.
>
> b. Hold and save the United States free from damages due to the construction works, to pay for all alterations to bridges, highways, railroads, pipelines, telephone and telegraph lines, and alterations to other

existing improvements made necessary as a result of the construction.

c. Maintain and operate all the works after comple-
[fol. p] tion in accordance with regulations prescribed by the Secretary of War.

In so many words the Grand River Authority with its power to issue 15 million dollars worth of bonds, is ready at all times to cooperate with the government in construction of these dams. We can meet any requirement you make upon us. Gentlemen, we are rarin' to go, let's build the Grand River Dams.

20. At the meeting of June 7,1937, the State Director of the Oklahoma Planning and Resources Board, another agency of the State of Oklahoma, presented the views of that board and stated:

> • • • in this particular area there has been superimposed upon this watershed, or a portion of this watershed, what is known as the Grand River Dam Authority created by the Act of the 15th Legislature, which in a manner eliminates any department from participation in this project. However, we are working hand in glove with this Authority and will continue to do so, protecting the water rights, looking after the people's interests in the Grand (Neosho) River and its tributaries.

21. Pursuant to the statements made by the Chairman of the Grand River Dam Authority, the plaintiff did in fact issue bonds to carry out the part of the program as required by the defendant and did provide certain lands, easements and rights-of-way for the construction of the Markham Ferry Dam and the Fort Gibson Dam.

[fol q-r] 22. By reason of the statements read and filed by the plaintiff's Chairman on June 7, 1937, and by reason of the matters set forth in this third defense, the defendant alleges that the plaintiff is now estopped from asserting all claims against the defendant set forth in its petition. The defendant further asserts that the plaintiff has waived the claims set forth in its petition and those claims, even if they existed, are forever discharged renounced and acquitted.

Respectfully, Perry W. Morton, Assistant Attorney General, Herbert Pittle, Attorney.

[fol. s] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

FIRST AMENDED ANSWER—Filed February 12, 1958

The United States of America, by Perry W. Morton, Assistant Attorney General, for its first amended answer to the plaintiff's petition, respectfully shows:

For its first, second and third defenses, the defendant adopts and realleges the matters set forth in its answer heretofore filed to the petition of the plaintiff.

Fourth Defense

For its fourth defense, the defendant shows:

1. The United States filed a declaration of taking and a petition in condemnation in Civil Action No. 2116 in the [fol. t] United States District Court for the Northern District of Oklahoma, to acquire certain lands owned by the plaintiff.

2. The plaintiff filed a motion to dismiss that action and that motion was overruled.

3. An order vesting title in the United States to the lands involved in that action was entered.

4. Thereafter, on November 21, 1947, the plaintiff filed a motion to vacate title of the United States and to dismiss the action. The grounds for dismissal and vacation of title urged by the plaintiff in that motion were substantially similar to the grounds asserted for its cause of action against the United States in the present case.

5. On February 10, 1954, the plaintiff filed an application in Civil Action No. 2116 for distribution of compensation and upon that application compensation was awarded.

6. The defendant asserts that the action of the plaintiff in applying for compensation in Civil Action No. 2116, in which it had raised the same legal questions presented in this case, and the proceedings in that case, constitute a bar to the present suit.

## Fifth Defense

For its fifth defense, the defendant shows:

1. By the Act of July 6, 1954, 68 Stat. 450, the United States authorized the Department of the Army and every other government agency to cooperate with the plaintiff in the construction by the plaintiff of a dam at Markham Ferry, Oklahoma. By that Act Congress also appropriated [fol. u] $6,500,000 as a monetary contribution of the United States to the plaintiff for aid in the plaintiff's construction of that dam.

2. Section 3 of the Act of July 6, 1954 provides that the acceptance by the Grand River Dam Authority of the amount appropriated shall constitute the agreement of the Grand River Dam Authority to hold and save the United States free and harmless from all claims heretofore or hereafter asserted of whatever nature including but not limited to acquisition of land, relocation, construction, operation and maintenance of the dam and reservoir.

3. The Act of July 6, 1954, also directed the Department of the Army to deliver to the plaintiff engineering plans and other data prepared by that Department for the proposed construction of a dam at Markham Ferry. The Department of the Army already has delivered to the plaintiff engineering plans and other data prepared by it at a cost of approximately $300,000.

4. The plaintiff has applied to the Department of the Army for the $6,500,000 appropriated by the Act of July 6, 1954. That sum has not yet been paid but negotiations were initiated for the purpose of arriving at a mutually satisfactory method of making payment of the amount appropriated by that Act of Congress.

5. By reason of the provisions of Section 3 of the Act of July 6, 1954, the defendant asserts that the acceptance by the Grand River Dam Authority of the amount for which it has applied and which was appropriated by that Act will constitute a complete bar to the present action, and this [fol. v] action, therefore, should be held in abeyance without decision until the Grand River Dam Authority receives and accepts payment of the sum appropriated and that thereupon the action be dismissed.

Wherefore, the defendant requests that the petition be dismissed and that the defendant have judgment against the plaintiff.

Respectfully, Perry W. Morton, Assistant Attorney General, Herbert Pittle, Attorney.

---

[fol. w] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

REPLY OF PLAINTIFF TO DEFENDANT'S AMENDED ANSWER—Filed March 12, 1958

The Grand River Dam Authority, plaintiff, replies to the fourth and fifth defenses contained in defendant's amended answer.

Reply to Fourth Defense

1. The plaintiff admits the allegations in paragraph 1 of the fourth defense, but asserts that Civil Action No. 2116 in the U. S. District Court for the Northern District of Oklahoma, together with a declaration of taking, was filed on the 19th day of June, 1947, and a judgment on the declaration to taking was entered in said cause on the 24th day of [fol. x] June, 1947. That the lands sought to be acquired by the United States were owned by the plaintiff as a dam site for the Markham Ferry dam. That sair condemnation proceedings were filed prior to the adoption of Rule 71a of the Rules of Civil Procedure.

2. Plaintiff admits the allegations in paragraph 2 of the defendant's fourth defense, but alleges that said motion to dismiss is the same motion as referred to in paragraph 4 of defendant's fourth defense.

3. Plaintiff admits the allegations in paragraph 3 of defendant's fourth defense.

4. Plaintiff admits that part of the allegations in paragraph 4 of defendant's fourth defense, that on November 21, 1947, the plaintiff filed a motion to vacate the title of the United States and to dismiss the action, but denies that

the grounds for vacation and dismissal urged by the plaintiff in said motion were substantially similar to the grounds asserted for cause of action in the present case and the plaintiff further alleges that the grounds asserted in said motion were:

a. That the United States was not authorized to take the Authority's Markham Ferry dam site land for the Government's use at the Fort Gibson project.

b. That the taking of said lands by the Secretary of War was unlawful, unauthorized, capricious, arbitrary and an abuse of discretion.

That none of the subject matter of the present lawsuit was involved in said condemnation proceeding.

[fol. y] 5. Plaintiff admits the allegations in paragraph 5 of the defendant's fourth defense.

6. Plaintiff denies the allegations in paragraph 6 of defendant's fourth defense.

## Reply to Fifth Defense

1. Plaintiff denies the allegations contained in paragraph 1 of defendant's fifth defense, except that Congress enacted Public Law 476 on July 6, 1954.

2. Plaintiff admits the allegations in paragraph 2 of defendant's fifth defense.

3. Plaintiff denies the allegations in paragraph 3 of defendant's fifth defense, except that the Act of July 6, 1954, directed the Secretary of the Army to transfer engineering data and other records as will be of value to the plaintiff.

4. Plaintiff denies the allegations in paragrph 4 of defendant's fifth defense, and alleges that the appropriation authorized by the Act of July 6, 1954, was a contribution by the United States for flood control benefits in the Markham Ferry project, that the Markham Ferry project is to be wholly owned by the Grand River Dam Authority.

5. The plaintiff denies all of the allegations in paragraph 5 of the defendant's fifth defense and asserts that said Act of July 6, 1954, has no application whatsoever to the issue involved in the present case. That said Act of July 6,

[fol. z] 1954, is applicable only to the Markham Ferry dam and reservoir project, and does not extend beyond the boundaries and limits of said Markham Ferry project in any respect.

Wherefore, the plaintiff demands judgment as prayed for in its petition.

Q. B. Boystun, General Counsel, L. Keith Smith, Special Counsel, Attorneys for Plaintiff.

[fol. 1] IN THE UNITED STATES COURT OF CLAIMS

No. 226-56

GRAND RIVER DAM AUTHORITY, Plaintiff,

v.

THE UNITED STATES, Defendant

Tulsa, Oklahoma

**Transcript of Trial Proceedings**—January 13 and January 14, 1958—10 A.M.

The parties met, pursuant to Notice of the Commissioner, at the time above stated, in Room 319 Federal Building, Tulsa, Oklahoma.

Present: Hon. Mastin G. White, Commissioner; Q. B. Boydstun, Esq. and L. Keith Smith, Esq., counsel for the Plaintiff; and Herbert Pittle, Esq., counsel for the Defendant.

Laurence E. Lindsay, a reporter, was thereupon sworn by the Commissioner to well and truly take down and transcribe the questions propounded to and the answers given by the witnesses, and to do all other things required of him by the Commissioner.

OPENING STATEMENTS AND COMMISSIONER'S EXHIBIT 1

Mr. Boydstun: If the Court please, I guess we should make our apperances here—who represents whom.

The Commissioner: Yes. Will you so inform the reporter?

APPEARANCES

Mr. Boydstun: Mr. Reporter, appearing for the plain-
[fol. 2] tiff, the Grand River Dam Authority, are Q. B. Boydstun, general counsel for the Authority, and Mr. L. Keith Smith, special counsel for the Grand River Dam Authority.

The Commissioner: Will the Government enter its appearance?

Mr. Pittle: You have my name, do you, Mr. Reporter?

The Commissioner: The Court is now ready to proceed

with the trial of the case of the Grand River Dam Authority against the United States, No. 226-56.

Is the plaintiff ready to proceed?

Mr. Boydstun: We are ready.

The Commissioner: Is the defendant ready?

Mr. Pittle: Yes, we are ready, Your Honor.

The Commissioner: I wonder if the plaintiff would like to make an opening statement at this time?

Mr. Boydstun: If the Court please, I would like to make a brief statement—I assume the Commissioner is more or less familiar with the issues.

The Commissioner: I have read the pleadings.

OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. Boydstun: This suit is by the Grand River Dam Authority, a public corporation, and an agency of the State of Oklahoma, against the United States.

The issues are as we allege in our petition, that the United States took certain property and property rights of the Grand River Dam Authority for the Government's [fol. 3] use in connection with its Fort Gibson Dam and Reservoir Power Project, on Grand River in Oklahoma, and that the Government has not compensated us for that property and the property rights which we allege and hope to prove that they have taken.

The property rights and property that we expect to prove that the Government has taken without paying just compensation for, is the Authority's exclusive license and franchise right to develop and generate electric power and energy at the Fort Gibson Dam site; that the Government has appropriated and made some additional use of the waters of Grand River for the production of electric power and energy at the Fort Gibson Dam site, and have not paid the Authority for that appropriation.

We expect to show that the Authority had these rights prior—long prior to the time that the Federal Government ever expressed any interest in the development of Grand River, which we expect to show is a non-navigable stream, and that all of the vested water rights—all of the State's water rights in and to Grand River were transferred to the Grand River Dam Authority by an act of the Oklahoma Legislature in 1935, and that no other agency of the

State had any control or jurisdiction over Grand River and the waters of Grand River after the 1935 act.

And I think at this time as I understand it, if the Court please, this matter has been by stipulation segregated into two parts—is that correct?

[fol. 4] The Commissioner: That's right, Mr. Boydstun; the parties, with the permission of the Commissioner have agreed that this trial will be limited to the issue of liability only; that will leave the question of damages, if any, to be determined in subsequent proceedings, if the Court should decide that the defendant is liable.

Mr. Boydstun: I take it at this time then it is not necessary for us to make any statement in connection with the amount of compensation that will be left for future trial.

The Commissioner: That's right; the question of the amount of damages will not be included in the present proceedings.

Mr. Boydstun: Then with this closing statement, it is our position that the Government obtained no right whatever from the State of Oklahoma; if they did obtain any rights from any Agency of the State of Oklahoma, that it was subject to the prior rights of the Grand River Dam Authority, and that taking property—such property should be compensated for under the Constitution.

The Commissioner: Mr. Pittle, do you wish to make a statement?

### Opening Statement on Behalf of Defendant

Mr. Pittle: Yes, if the Court please. As Mr. Boydstun said, this is a suit for damages which plaintiff asserts amount to ten million dollars, representing just compensation for what it says also is the taking of those property [fol. 5] rights. These property rights are asserted in the petition to represent two items: First, the actual water in the Grand River which plaintiff says it owns exclusively and which it says the Government is making beneficial use of; and, secondly, the taking of the franchise of the Grand River Dam Authority by the Government.

Now as I understand the plaintiff's petition on that, the taking of the franchise is asserted to have occurred by reason of the generation of power by the United States at this Fort Gibson Dam, and selling it in competition with the plaintiff. In our answer we have set forth three defenses

which I won't go into in detail at this time except to point out one of them is based on estoppel, and the facts which will be obtained largely from documents, will show the factual basis for this defense.

We of course assert that the plaintiff's petition fails to state a claim for which relief can be granted—and this alleges merely a legal defense. The other defense is on the merits, and that is a denial of the assertion that we have taken anything that belongs to the plaintiff. The facts we believe will establish that we have not taken anything that belongs to the plaintiff; we haven't taken the plaintiff's water—assuming the plaintiff had an exclusive right to all of the water as it alleges, with which we don't agree—with which assertion we don't agree. We say as a factual [fol. 6] matter that the use of water which the Department of the Army in the operation of Fort Gibson Dam is making, is not a consumptive use of water, so that even if the plaintiff had the exclusive ownership of the waters in the Grand River, we are not using their water. We are using that water only after the plaintiff has voluntarily released it from its Pensacola Dam. After its release we would prove—the record will establish that we are not consuming that water; the Fort Gibson Dam is what is known as a run-of-the-river dam; it doesn't store ahead; it just uses water as it goes through the spillway. Our position on that briefly to summarize, is, plaintiff believes it is the owner of those waters; our position is, let them keep them; we use them only after they release them.

As to the taking of the franchise, our position there will be—I believe entirely legal. And that it will be based on the proposition which we will argue and brief at the appropriate time, that the plaintiff does not have any right to be free from competition; so that on the basis of several Supreme Court decisions our operation is not a taking—a compensable taking under the fifth amendment. I mentioned, during the—before this hearing began to Mr. Boydstun that upon my arrival here in Tulsa, the first opportunity I had had to make any field examination of documents and other matters which might be available. As a result of my examination I have come up with what I believe will [fol. 7] be two additional defenses which are not alleged in the answer, and I will therefore ask permission to put on

documentary evidence in support of these two defenses, subject to the Government's obtaining leave of Court to amend its petition—to amend its answer, assuming that these defenses not be specially pleaded. If you wish I can state now briefly what those defenses are.

The Commissioner: I think perhaps it might be helpful to have the statement in the record.

Mr. Pittle: All right, sir. The first matter arises out of a small condemnation case which was instituted by the United States sometime ago to acquire two relatively small tracts of land, which were owned by the Grand River Dam Authority. That case was Civil No. 2116, in the United States District Court for the Northern District of Oklahoma. The Federal Government filed a petition and condemned these tracts and named among others, the Grand River Dam Authority as a party defendant. The Grand River Dam Authority filed a motion to dismiss, which was overruled. It then filed a notice to vacate title of the United States, and to dismiss the lands designated as these tracts. That motion was filed on November 21, 1947. The motion, which is quite a lengthy one, presents as grounds for dismissal of the condemnation suit, some of the same matters upon which the plaintiff is relying for recovery in the present lawsuit.

[fol. 8] The motion remained pending on the docket for several years, until February 10, 1954, when the Grand River Dam authority filed an application for distribution of compensation in that case. Upon its application, compensation was awarded, subject, I believe, to the right to a jury trail as to the amount, but it requested and obtained the amount which was deposited under the declaration-of-taking procedure. It is our position that that constitutes a bar, or, res adjudicata, to the present claim, or portions of it, on the ground that the plaintiff is barred by resadjudicata, or split its cause of action.

The second matter of defense which I will want to raise is one arising out of legislation and proceedings had subsequent to the construction of the Pensacola Dam, and the Fort Gibson Dam, namely, with respect to Markham Ferry; Markham Ferry was the location for a third proposed dam which was to be constructed by either Grand River Dam Authority or the United States—that is not important at

this point; but the important fact is that the United States enacted legislation authorizing the Corps of Engineers to construct a dam at Markham Ferry. That legislation was subsequently amended by the Act of July 6, 1954, which authorized the Corps of Engineers and the department of the Army, and every other Government agency to cooperate with the Grand River Dam Authority in its construction of the dam at Markham Ferry. In other words, Congress deauthorized the construction of the dam at Markham Ferry by the United States, and appropriated $6,500,00 as a [fol. 9] monetary contribution of the United States to Grand River Dam authority for its construction of that dam.

Section 3 of the Act of July 6, 1954, asserts that the acceptance by the Grand River Dam Authority of the foregoing amount—that is, the $6,500,000—shall constitute an agreement of the Grand River Dam Authority to hold and save the United States free and harmless from all claims heretofore or hereafter asserted, of whatever nature, including, but not limited to, acquisition of land, relocation, construction, operation, and maintenance of the dam and reservoir.

It will be our legal position that while facts up to this present moment may show that Grand River Dam Authority has not received the $6,500,000, it has received approximately three million dollars worth of engineering plans and designs, which were prepared by the—I am sorry,—$300,000—which were prepared by the Corps of Engineers and which were turned over to it as directed by other provisions of this Act, and that this constitutes a bar to the present action.

Thank you.

The Commissioner: Well, I think that we will permit the plaintiff to state its position with respect to these matters whenever the defendant during the course of the trial offers the evidence in support of these additional defenses, which the defendant says are pertinent to the present case.

(Thereupon at the direction of the Commissioner, con- [fol. 10] versation was had off the record and thereafter the following proceedings were had on the record:)

The Commissioner: The record should show at this point I think that the parties during the course of the pretrial

proceeding under Rule 28(b) of the Court of Claims, have agreed upon certain facts as true. In that connection however the plaintiff has indicated that certain of these facts, although true, are inadmissible from its standpoint.

Now I have had prepared a typewritten statement of these various facts that the parties have agreed upon as true, and the various portions of the statement to which the plaintiff objects, insofar as admissibility is concerned, have been checked with red.

At the present time I am going to have the reporter mark them for identification as Commissioner's Exhibit No. 1, this statement of the facts agreed upon by the parties as true, pursuant to the pretrial proceedings under Rule 28(b).

(Instrument identified as Commissioner's Exhibit 1.)

The Commissioner: I have previously furnished to the attorneys for both sides copies of this exhibit and it might be appropriate at this time to permit the plaintiff to state its objections to the particular portions of the statement which it regards as inadmissible.

Mr. Boydstun: Well, I believe the first statement, Mr. Commissioner, is to the number designated as Item No. 4, [fol. 11] which is the first red pencil mark that appears——

The Commissioner: Well, I believe that there should be a mark at No. 2.

Mr. Boydstun: Oh, yes, yes, —I am not seeing good here —yes.

Well, we admit that the exhibit or the statement is factually true. But our objections to it are that it is immaterial, incompetent and irrelevant to prove or disprove any issues in the case. Because that was a public hearing held by the Corps of Engineers in which the public was invited to make various statements; and I don't believe that it is—our position is that it does not prove or disprove any of the issues in the lawsuit.

And then I believe No. 3 is probably the next one, in which we do not question the authenticity of that statement, but for the same reason we do not think it is admissible as—for the same reason as to No. 2.

No. 4 sets out certain statements made by the Chairman of the Grand River Dam Authority—Chairman of the Board of Directors of the Grand River Dam Authority at this

meeting. We admit the authenticity of the statements but it is our contention that the statements do not grant, or acquiesce, or give any consent of the plaintiff, Authority, for the taking or using of the waters, or infringes on the rights on Grand River that the Authority held at that time. [fol. 12] The Board of Directors of the Grand River Dam Authority is the governing body, as fixed by statute, and the only action that the Authority can take is by a majority of the Board of Directors of the Authority. And it is our contention that that was never done, either before, or it wasn't ratified after. And that the—well, I started to say, that the allegations of the Government, that the Government made that we did transfer certain easements to—I believe that is in some other paragraph—so we contend that this is inadmissible because the statements of the Chairman of the Board of Directors is not binding on the Authority unless the Board of Directors has authorized it or approved it.

Number 5, we admit the authenticity of that statement, but it is our contention that any statement made by the Planning and Resources—the Oklahoma Planning and Resources Board, or any officer thereof, after 1935, relative to granting permits or granting any rights for the development and use of the waters of Grand River was of no force and effect because the Planning and Resources Board had no jurisdiction over Grand River after the GRDA Act of 1935. And this statement also sets out or indicates to me that the statement of the Planning Board was giving notice, to the Government, that the Grand River Dam Authority had been created, and superimposed upon the Grand River in Oklahoma. And we think that it has no force or [fol. 13] effect. And did not grant any rights. I believe the next one—or is that all of them—No. 9, on page 4; we think that is inadmissible for the same reason as set forth in No. 5 above.

We object to the admissibility of 9 and 10 for the same reasons that we object to No. 5 above, and I believe all the rest of them are—there is no controversy about.

The Commissioner: Thank you, Mr. Boydstun. I notice on page 5 that there are a couple of typographical errors which I have corrected in the original of the exhibit. In the second line on page 5 the word "grant," should be "grand"; and the same is true in the sixth line from the bottom of the

page. It seems to me that the Court ought to have a very full record here with respect to the background relating to the relationship of the parties in connection with the development of the water resources of the Grand River. Hence I shall now overrule the plaintiff's objections to certain portions of Commissioner's Exhibit No. 1, and receive in evidence that exhibit, as Commissioner's Exhibit No. 1.

Mr. Boydstun: If the Court please—pardon me—but there is another typographical error; it may be my fault; at the top of page 4, where it says "eighty thousand kilowatts" I think that should be sixty—sixty thousand, where it says eighty.

The Commissioner: Is that agreeable, Mr. Pittle?

Mr. Pittle: I believe that is probably correct.

[fol. 13.1] The Commissioner: All right, we will correct, then, the first line on page 4 by substituting "60,000" for "80,000."

[fol. 14] DOCUMENTARY EVIDENCE FOR PLAINTIFF

The Commissioner: The parties have also informed each other with respect to at least some of the exhibits that they intend to offer at the trial. I think that in the interest of orderly procedure we might now mark the exhibits that the parties intend to offer, including any additional ones besides those previously referred to in the exchange of correspondence.

We will first mark the plaintiff's Exhibits, Mr. Boydstun. Just tell the reporter what each one is and I will assign him a number.

Mr. Boydstun: Okay, Mr. Commissioner, I think I will follow the order in which we presented them in the pretrial conference.

The Commissioner: Very well.

Mr. Boydstun: The first offer is a judgment of the District Court of Mayes County, Oklahoma, in case No. 5263, City of Tulsa, a municipal corporation, plaintiff, versus Grand-Hydro, and others, defendants.

The Commissioner: You may give the date of the judgment, Mr. Boystun.

Mr. Boydstun: On the 10th day of February, 1938.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 1.

[fol. 15] (In every instance where the Commissioner directs that an exhibit be given a certain number, that exhibit is by the reporter given that number.)

Mr. Pittle: Excuse me a moment, Mr. Boydstun.

Do you wish us to make objections to these as they go along, Commissioner, or——

The Commissioner: In the case of plaintiff's exhibits, I have seen at least eight of them, and I will wait and hear the defendant's objections to those eight, in bulk.

Mr. Pittle: All right.

The Commissioner: And perhaps as to the others as well.

Mr. Boydstun: Next is a memorandum to R. V. L. Wright, the General Manager of the Grand River Dam Authority, from Holway & Neuffer, Engineers, dated July 30, 1938.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 2.

Now I was wondering about the identity of Mr. Wright. Is it conceded by the defendant that he is or was the general manager of the Grand River Dam Authority at that time, Mr. Pittle?

Mr. Pittle: I have no independent information about that date. I am willing to take plaintiff's counsels' assertion that he was.

The Commissioner: All right. Thank you.

[fol. 16] Mr. Boyd: The next is an excerpt of the minutes of the recessed meeting of the Board of Directors of the Grand River Dam Authority held on the 6th day of June, 1939, at Vinita, Oklahoma, showing resolution No. 273, authorizing the construction of a transmission line from the Pensacola Dam to the vicinity of the Fort Gibson Dam.

The Commissioner: That will be marked for identification as Plaintiff's Exhibit 3.

Mr. Boydstun: The next, the excerpts of the minutes of a recessed meeting of the Board of Directors of the Grand River Dam Authority held at Vinita, Oklahoma, on the 25th day of July, 1939, showing resolution No. 315, authorizing the construction of the Markham Ferry substation and switching station, and for the acquisition of the necessary lands.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 4.

Mr. Boydstun: Next is a letter dated March 2nd, 1940, from H. A. Montgomery, Captain, Corps of Engineers, District Engineer, Tulsa, Oklahoma, to Holway & Neuffer, relating to the furnishing of certain data pertaining to the Fort Gibson project.

The Commissioner: That document will be marked for identification as Plaintiff's Exhibit No. 5.

Mr. Boydstun: Next excerpts of the minutes of a recessed meeting of the Board of Directors of the Grand [fol. 17] River Dam Authority held at Vinita, Oklahoma, on the 9th day of July, 1940, showing that the plaintiff authorized its engineers, Holway and Neuffer, to proceed with the further engineering in connection with the construction of the Markham Ferry and Fort Gibson Dams.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 6.

Mr. Boydstun: Next is a statement of the Grand River Dam Authority filed with the Corps of Engineers at a public hearing held in Tulsa, Oklahoma, on the 4th day of May, 1945.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 7.

Mr. Boydstun: Next, a letter from France Paris, General Manager of the Grand River Dam Authority, to the Chief of Engineers, Corps of Engineers, Washington, D. C., dated February 14, 1946.

The Commissioner: That document will be marked for identification as Plaintiff's Exhibit No. 8.

Mr. Boydstun: Mr. Commissioner, that concludes the exhibits that we have submitted in the pretrial. Now we have some others that we would like to offer at the proper time.

The Commissioner: Do you prefer to have them marked now or would you rather wait?

Mr. Boydstun: I think we had just as well go ahead and mark them now.

[fol. 18] The Commissioner: I suppose we had. All right; suppose we do that.

Mr. Boydstun: First we would like to offer a general outline map which is attached to the plaintiff's petition as Exhibit A.

The Commissioner: As of what time was this map prepared—if that is important?

Mr. Boydstun: Well, I would have to ask Mr. Holway; I think it was back about 1940.

Mr. Holway: The original was prepared in 1939.

The Commissioner: Mr. Pittle, are you familiar with the date of the preparation of this map?

Mr. Pittle: I am trying to find that out just now.

The Commissioner: All right. Well, in the meantime we will mark the map for identification as Plaintiff's Exhibit No. 9.

Mr. Boydstun: If the Court please, this next item here I would like to maybe make a statement. The Oklahoma Legislature in 1939 amended the Grand River Dam Authority Act of 1935 in the '39 amendment, they specifically authorized the construction of the Fort Gibson Dam together with the Markham Ferry Dam and appropriated, or authorized the issuance of a definite amount of money for the construction of those projects. The only place that that—the Act has been amended later. The only place you can find it is to pick up a copy of the Oklahoma Ses-[fol. 19] sion Laws which I think the Court will take judicial notice of, but for convenience I was going to offer that section of the statute as an exhibit—of that session law.

The Commissioner: Very well, we will mark this as Plaintiff's Exhibit——

Mr. Boydstun: I will have to read that to you, I expect, Mr. Commissioner. I see I failed to bring my copy. It is a short excerpt.

The Commissioner: All right, suppose then, subject to verification, we have Mr. Boydstun read into the record at this point the pertinent statutory provision.

Mr. Pittle: Would you identify that also?

Mr. Boydstun: Yes, I will identify it. That portion of article 3 of chapter 70, Oklahoma Session Laws of 1939, at page 560, as follows: "Provided that an amount of such bonds in the aggregate sum of $10,000,000 is authorized to enable the construction of dams at Markham's Ferry, and Fort Gibson, and transmission lines at or near the location sites of said dams, as shown in document 107 of the first session of the Seventy-Sixth Congress".

The Commissioner: All right, that is admitted in evidence subject to verification.

Mr. Boydstun: The next that we would like to offer would be a copy of the loan and grant agreement between [fol. 20] the United States of America and the Grand River Dam Authority dated October 16, 1937.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 10. Will you hand it to the reporter, please?

Mr. Boydstun: Next we would like to offer copies of correspondence between the Grand River Dam Authority and the Corps of Engineers, Tulsa office. This offer consists of several letters here.

The Commissioner: Give the dates of the letters if you will, Mr. Boydstun.

Mr. Boydstun: A letter dated October 13, 1952.

The Commissioner: From whom to whom; who are the parties involved?

Mr. Boydstun: From Robert F. Hunter, Chief of Operations, to Q. B. Boydstun, general counsel for the Authority.

The Commissioner: I think we will mark that particular letter as Plaintiff's Exhibit 11-A.

Mr. Boydstun: And then a copy of a letter from me to the District Engineer, dated January 13, 1953.

The Commissioner: That will be marked Plaintiff's Exhibit 11-B, for identification.

Mr. Boydstun: And a letter dated January 7, 1953, from the Attorney General of the State of Oklahoma, to Q. B. [fol. 21] Boydstun, general counsel.

The Comissioner: That letter will be marked 11-C, for identification.

Mr. Boydstun: A letter dated January 19, 1953, from E. G. Herb, Colonel, District Engineer, to Q. B. Boydstun, general counsel.

The Commissioner: It will be marked Exhibit 11-D, for identification.

Mr. Boydstun: A letter of December 2nd, 1953, from France Paris, General Manager of the Authority, to the Corps of Engineers, Tulsa, Oklahoma.

The Commissioner: That letter will be marked Plaintiff's Exhibit 11-E, for identification.

Mr. Boydstun: A letter dated March 8, 1954, from Q. B. Boydstun, general counsel of the Authority, to Mr. Robert Hunter, Corps of Engineers, Tulsa.

The Commissioner: That letter will be marked Plaintiff's Exhibit 11-F, for identification.

Mr. Boydstun: A letter dated March 11, 1954, from Stanley G. Reiff, District Engineer, to Q. B. Boydstun, general counsel.

The Commissioner: It will be marked Plaintiff's Exhibit 11-G, for identification.

Mr. Boydstun: A letter dated March 30, 1954, from Q. B. Boydstun, general counsel, to Colonel Stanley G. Reiff. [fol. 22] The Commissioner: It will be marked Plaintiff's Exhibit 11-H, for identification.

Mr. Boydstun: A letter dated April 6, 1954, from Robert F. Hunter, to Q. B. Boydstun, general counsel.

The Commissioner: It will be marked Plaintiff's Exhibit 11-I, for identification.

Mr. Boydstun: A letter dated February 3, 1956, from W. J. Himes, Colonel, to Q. B. Boydstun, general counsel.

The Commissioner: That letter will be marked Plaintiff's Exhibit 11-J, for identification.

Mr. Boydstun: Next we would like to offer an excerpt from House Document No. 308, Sixty-Ninth Congress, first session, Volume 3, pages 1260 and 1261. Date of the matter referred to therein, or the excerpt, is June 19,—dated June 19, 1931. We offer a photostatic copy.

The Commissioner: That document will be marked for identification for Plaintiff's Exhibit No. 12.

Mr. Boydstun: Next we wish to offer an excerpt from House Document 308, Seventy-Fourth Congress, first session, Volume 1, page 4, paragraph 11, dated July 26, 1935, and in part—I don't have that copied, Mr. Comissioner, but I can read it into the record; it is just a very short quote.

The Commissioner: All right, we will permit you to read it into the record, Mr. Boydstun, then we will act on it.

Mr. Boydstun: "The State of Oklahoma has enacted [fol. 23] legislation creating the Grand River Dam Authority for the development of hydroelectric power on Grand River."

The Commissioner: Mr. Pittle, have you any objection to that statement being received in evidence?

Mr. Pittle: No, sir.

The Commissioner: Very well, that is admitted.

Mr. Boydstun: Then we have a certificate of lack of record; this certificate of Andrew I. Rohmiller——

The Commissioner: Will you spell the name for the reporter.

Mr. Boydstun: Andrew I. R-o-h-m-i-l-l-e-r, the Secretary of the Grand River Dam Authority——

The Commissioner: Just state generally what it relates to.

Mr. Boydstun: He certifies that he is the custodian of all the official records of the Authority and that on diligent search of all records of the Authority he fails to find any authorization authorizing George Shaefer as Chairman of the Board of Directors to make the statement on June 7, 1937, as alleged in the defendant's answer.

The Commissioner: Well, that document will be marked for identification as Plaintiff's Exhibit No. 13.

Mr. Boydstun: I assume, if the Court please, that we—it will be taken that I offered this in evidence—collectively, if I did not make that a part of the record as I went along [fol. 24] I would like to now offer all of the exhibits.

The Commissioner: That will be noted, Mr. Boydstun.

Now, Mr. Pittle, I notice you had copies of the first eight exhibits that we have marked for identification. Are you sufficiently familiar with the exhibits that we have marked for identification, from 9 through 13, to state your position with respect to them at this time?

Mr. Pittle: Probably not entirely, sir.

The Commissioner: Well, suppose then we hear you with respect to the first eight exhibits and then we will let you reserve your objections and of course I will reserve my ruling, with respect to the others until a later time in the trial.

Mr. Pittle: Defendant objects to the Plaintiff's Exhibit No. 1 for identification, being the copy of the decree in the case which is identified in the exhibit on the ground that it is incompetent to prove the fact that it seeks to prove, being a suit between plaintiff and another party, and a suit to which United States was not a party, and that it is irrelevant and immaterial for the purposes for which it is offered. We do not question its authenticity.

The Commissioner: It is my understanding that the de-

fendant does not have any objection on the ground of authenticity to any of the first eight exhibits.

Mr. Pittle: No—I may make that statement generally, [fol. 25] that is correct.

The Plaintiff's Exhibits 2 to 6, inclusive, we will object to those for the same reasons that are set forth in our letter of April 4, 1957, to Mr. Boydstun under proceedings in conformity with Rule 28.

The Commissioner: You may state if you will for the record——

Mr. Pittle: That objection is that the purpose for which those documents have been offered, assuming the purpose is the same as represented during the time, Rule 28 proceedings were going on, is immaterial and irrelevant to the present action.

As to Plaintiff's Exhibit No. 7, we would object to that on the ground of materiality and relevancy. We say it is incompetent to prove that the plaintiff asserted a claim prior to the construction of the Fort Gibson project—I am sorry, I misstated that; we assert that it is incompetent to prove that the plaintiff, having asserted a claim prior to the Fort Gibson project, can prove by that document that the Government failed to acquire the rights which the plaintiff now says it should be reimbursed for. And as to Plaintiff's Exhibit 8, we object to that for the same reasons as we have objected to No. 7,— and those are the first eight.

On Plaintiff's Exhibit 9, that was a general outline map prepared by plaintiff's engineers; we have not been able [fol. 26] to find a date on it or determine its authenticity otherwise. Insofar as it will show the same physical matter as shown on Government maps, we would of course have no objection. Insofar as it may show any data, if that becomes material, we would reserve our objection to affirmatively prove or disprove such variances.

The Commissioner: Well now how long do you think it would take you to check it against the Government maps for the purpose of verification?

Mr. Pittle: It will probably take a day or so, or, I would suggest that we might be able to do that, even if this proceeding should end before that has been done—that we take care of it subsequently.

The Commissioner: All right, suppose we pass on then.

Mr. Pittle: As to Plaintiff's Exhibit 10, which was an excerpt from the session laws of Oklahoma, we recognize the court of course can take judicial notice of it—of the session laws—I assume.

The Commissioner: I don't believe that is the number of the session laws. I believe that the section of the session laws, Mr. Boydstun merely read them into the record.

Mr. Pittle: That wasn't given a number then?

The Commissioner: No.

Mr. Pittle: Then I'm not being asked to make any ob-
[fol. 27] jection or agreement?

The Commissioner: Well, I said, subject to verification I would receive it in evidence, and as I don't hear any objection—if you wish to make an objection I will cancel my previous admission of the matter in evidence and then reconsider it.

Mr. Pittle: Well, we do not object to the authenticity of the statement because that is subject to verification. Our objection would be a formal one for the record only, that the Oklahoma session law insofar as it might conflict with any other law or Act of Congress would not be binding upon the United States in this matter.

The Commissioner: Well, that objection will be overruled, and we will re-admit in evidence the excerpt which has previously been read into the record.

Mr. Pittle: Plaintiff's Exhibit 10 we have no objection to.

The Commissioner: In the absence of objection then Plaintiff's Exhibit No. 10 is admitted in evidence.

Mr. Pittle: As to the Plaintiff's Exhibit No. 11, we do not object to the authenticity of any of the documents in that correspondence; we don't object to it for any other grounds except insofar as it may—if the purpose may be to constitute any admissions on the part of the Government, we reserve our right to rebut any contention.

[fol. 28] The Commissioner: Well, certainly you would have the right to rebut any of the statements in there; and subject to that then you are agreeable to having these various letters or copies of letters received in evidence?

Mr. Pittle: Yes, sir.

The Commissioner: Very well.

Mr. Pittle: We just didn't want our position to be ques-

tioned, having admitted these in evidence, and then be stopped from contradicting anything that may be argued constituting admissions.

The Commissioner: All right, you may certainly reserve your right to put on contradictory evidence with respect to any of the statements contained in these letters. With that reservation then of the right of rebuttal on the part of the defendant I will now receive in evidence the ten letters or copies of letters, previously marked for identification as Plaintiff's Exhibits 11-A through 11-J, inclusive.

Mr. Pittle: Now, Plaintiff's Exhibit 12 was an excerpt from House Document 308, is that correct,—Sixty-Ninth Congress, first session.

We have no objection to that. We would ask the Court however to take judicial notice of the entire document, if any other provisions of it become material in this case.

The Commissioner: That would be appropriate. Without objection then the document marked for identification as [fol. 29] Plaintiff's Exhibit 12 is admitted in evidence.

Mr. Pittle: To Plaintiff's Exhibit 13, the certificate of lack of record, we do not object.

The Commissioner: Without objection that document is admitted in evidence as Plaintiff's Exhibit No. 13.

Now with respect to the first eight exhibits, I might state for the record that Plaintiff's counsel furnished copies of those exhibits to me sometime ago during the course of the pretrial proceedings under Rule 28(b) and I have examined each of them prior to the trial. In line with my statement a few minutes ago to the effect that I believe we ought to have in the record all of the pertinent information bearing upon the relationship of the parties in connection with the development of the water resources of the Grand River and also pertinent material bearing on the positions taken by the parties in the past, I am going to overrule the defendant's objections and admit in evidence the exhibits previously marked for identification as Plaintiff's Exhibits 1 through 8, inclusive.

Now they are admitted for the purpose of showing decisions taken in the different documents and of showing what was done at the various times indicated therein. As far as factual statements set out in the documents are

concerned, they are not considered as evidence in this case to prove the truth of the statements of fact made in them, [fol. 30] and to illustrate, I might just pick out Plaintiff's Exhibit No. 1, that being a decree previously entered by a State Court in Oklahoma. Now I am admitting that for the purpose of showing what the Court held with respect to the right of the plaintiffs in the waters of the Grand River and not for the purpose of establishing the proof of the various factual statements made by the Court in that case. I believe that the meat of the exhibit insofar as its admissibility is concerned is found in paragraph 18 I think—I don't have a copy before me—may I see it, Mr. Reporter?

Yes, I think the basic portion that I regard as significant in this case is set out in paragraph 18 of this exhibit; in other words I am showing what—admitting this document for the purpose of showing what the Court held with respect to the rights of the plaintiff.

Now as to Plaintiff's Exhibit No. 9 for identification, I don't believe that there has been sufficient predicate laid as yet for its admission in evidence since the Government hasn't had an opportunity thus far to verify it as to accuracy, and so forth. I will merely delay a ruling on Plaintiff's Exhibit No. 9 at this time.

Mr. Boydstun: Mr. Commissioner, if I may interrupt a second here, I might clarify—the purpose of that exhibit 9 is not for any particular factual information that may appear on it, but the only purpose is to show the general [fol. 31] plans of the Authority for the development of the entire Grand River—that is the extent of our—that is the purpose for which we want to use it, just for an outline. As far as any factual information on there, we didn't intend to show anything other than what the over-all comprehensive plan was.

The Commissioner: As of what time, Mr. Boydstun?

Mr. Boydstun: About 1939, I believe; we will show that by Mr. Holway.

The Commissioner: Mr. Pittle, I don't know whether you heard Mr. Boydstun's explanation, that he is offering this exhibit for the purpose of showing what the plaintiff's plan was as of 1939 with respect to the development of the Grand River.

Mr. Pittle: Well, for that limited purpose we have no objection except as to the date 1939. That may be material and we would reserve our offer to admit it—or our consent to its admission—

The Commissioner: Yes.

Mr. Pittle: We may do so with the understanding that it does not constitute an admission that as early as 1939 the plaintiff had the plan which it now says this document would show.

The Commissioner: I think then we had better wait on Plaintiff's Exhibit No. 9 for identification; Mr. Pittle, [fol. 32] would you like to have the defendant's exhibits marked at the present time?

Mr. Pittle: Yes, I would, Your Honor; and it is going to take a little while, and I wonder if we might have about five minutes before I start.

The Commissioner: Certainly. We will have a ten minute recess at this time.

[fol. 33] DOCUMENTARY EVIDENCE FOR DEFENDANT

The Commissioner: All right, Mr. Pittle, we will now mark the defendant's exhibits for identification.

Mr. Pittle: If the Court please, the defendant offers for identification, and asks the reporter to mark as our first exhibit the entire transcript of the public hearing for reservoirs in the Grand River.

The Commissioner: That will be marked for identification as Defendant's Exhibit No. 1.

Mr. Pittle: As Defendant's Exhibit 2 for identification we offer project data for the Pensacola Reservoir.

The Commissioner: It will be so marked for identification.

Mr. Pittle: As Defendant's Exhibit No. 3 for identification we offer data concerning the Pensacola Reservoir and its effect on Fort Gibson Reservoir.

The Commissioner: It will be so marked for identification.

Mr. Pittle: As Defendant's Exhibit 4 we offer completion data for Pensacola Reservoir, dated September 1935.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 4.

Mr. Pittle: As Defendant's Exhibit No. 5, we offer the order of the Federal Power Commission relative to cost of Pensacola Reservoir, et cetera—a very long title, iden-
[fol. 34] tified as Project 1494.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 5.

Mr. Pittle: As Defendant's Exhibit No. 6, we offer the order of the Secretary of the Interior, dated September 1, 1943, and executive orders 9366 and 9373. Parenthetically I might remark that executive orders of course may be taken judicial notice of, but for convenience, we have copies——

The Commissioner: These three documents will be marked for identification respectively as Defendant's Exhibits 6-A, 6-B, and 6-C.

Mr. Pittle: Now as Defendant's Exhibits No. 7, we offer a copy of the transcript of public hearing of Fort Gibson Reservoir on Grand River, held January 27, 1942.

The Commissioner: It will be marked for identification as Defendant's Exhibit 7.

Mr. Pittle: As Defendant's Exhibit 8, we offer a letter from the Chief of Engineers, to the Grand River Dam Authority dated January 6th, 1944.

The Commissioner: This letter will be marked for identification as Defendant's Exhibit 8.

Mr. Pittle: Now as Defendant's Exhibit No. 9, we offer a letter to the Grand River Dam Authority from the Chief of Engineers, letter being dated March 11, 1946.

The Commissioner: That letter will be marked for iden-
[fol. 35] tification as Defendant's Exhibit No. 9.

Mr. Boydstun, am I correct in my impression that the plaintiff has previously indicated that it has no objection to the document that we just marked for identification as Defendant's Exhibit No. 8, as being a letter from the Chief of Engineers to the Grand River Dam Authority, dated January 6, 1944.

Mr. Boydstun: On January 6, 1944?

The Commissioner: Yes, sir. It is on page 5 of one of your letters to the Department of Justice.

Mr. Boydstun: Mr. Pittle, is that that letter about that water down there at the Oklahoma Ordnance Works?

We have no objection to the authenticity of it; we just—I think we objected to it as not material to the issues.

The Commissioner: Well, we will pass on then; and I will afford the plaintiff an opportunity to state its position with respect to all of these exhibits.

Mr. Pittle: So the record may be complete, if the Commissioner please, I could remark at this time that Defendant's Exhibit No. 9 is the same as Plaintiff's Exhibit No. 8, I believe, except that we have with it attached to the letter to the Grand River Dam Authority, the endorsements and other documents which are self-evident.

The Commissioner: Well, they will all be considered as [fol. 36] a part of Defendant's Exhibit 8—oh, we just marked one as Defendant's Exhibit 9—oh, you are saying that Defendant's Exhibit No. 9 for identification is the same as Plaintiff's Exhibit No. 8, is that correct?

Mr. Pittle: In part.

The Commissioner: All right, that will be noted.

Mr. Pittle: Now as Defendant's Exhibit No. 10, we offer the report containing pertinent data on the Fort Gibson Dam and Reservoir project, dated June 1946, revised August, 1946.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 10.

Mr. Pittle: As Defendant's Exhibit No. 11, we offer completion data pertaining to Fort Gibson Dam and Reservoir, dated September 1955.

The Commissioner: This will be marked for identification as Defendant's Exhibit No. 11.

Mr. Pittle: As Defendant's Exhibit No. 12, we offer a copy of the contract for flowage easement, and conveyance of right-of-way entered into February 6, 1950.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 12.

Mr. Pittle: As Defendant's Exhibit No. 13, we offer the petition of the Grand River Dam Authority for an order determining and fixing charges to be paid to it for benefit [fol. 37] of storage and head water improvements at the Pensacola River—Pensacola power project, before the Federal Power Commission.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 13.

Mr. Pittle: As Defendant's Exhibit No. 14 we offer a letter dated March 17, 1953, from the Corps of Engineers to the Division Engineer, together with a number of endorsements.

The Commissioner: Well, this letter together with the endorsements will be marked for identification as Defendant's Exhibit No. 14.

Mr. Pittle: As Defendant's Exhibit No. 15, we offer copies of correspondence relating to the head water benefits to Fort Gibson Reservoir derived from the Pensacola Reservoir.

The Commissioner: Suppose you indicate the dates of the correspondence, the persons who wrote the various letters, and the addressees.

Mr. Pittle: All right, the first is a memorandum of May 12, 1954, to the Division Engineer from the Corps of Engineers.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 15-A.

Mr. Pittle: And the first endorsement dated—the endorsement doesn't appear to have a date.

The Commissioner: Well,——

[fol. 38] Mr. Pittle: It is from the Assistant Division Engineer, Ray, the subject being the memo of 12 May '54.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 15-B.

Mr. Pittle: The next is the second endorsement dated July 16, 1954, to the Division Engineer, from the District Engineer.

The Commissioner: The second endorsement will be marked for identification as Defendant's Exhibit 15-C.

Mr. Pittle: The third endorsement dated October 6, 1954, to the District Engineer from the Assistant Division Engineer.

The Commissioner: This endorsement will be marked for identification as Defendant's Exhibit 15-D.

Mr. Pittle: And the fourth endorsement dated April 18, 1955, to the Division Engineer from the District Engineer.

The Commissioner: The fourth endorsement will be marked for identification as Defendant's Exhibit 15-E.

Mr. Pittle: And the fifth endorsement dated May 2, 1955,

to the Corps of Engineers from the Assistant Division Engineer.

The Commissioner: The fifth endorsement will be marked for identification as Defendant's Exhibit 15-F.

Mr. Pittle: Now as Defendant's Exhibit 16-A, I offer a copy of the motion to vacate title and to dismiss, et cetera, [fol. 39] filed by the Grand River Dam Authority, November 21, 1947, in the case entitled, United States of America, versus 1031.15 acres of land, more or less, situate in Mayes County, Oklahoma, and Ray Bonella Grand River Dam Authority, et al., No. 2116 Civil.

The Commissioner: That will be marked for identification as Defendant's Exhibit 16-A.

Mr. Pittle: And as Defendant's Exhibit 16-B, I offer a copy of the application for distribution of compensation filed in the proceedings.

The Commissioner: That document will be marked for identification as Defendant's Exhibit 16-B.

Mr. Pittle: As Defendant's Exhibit 17, I offer a copy of an order authorizing the issuance of a license on project No. 1494, upon the application of the Grand River Dam Authority, and it is dated January 27, 1939.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 17.

Mr. Pittle: As Defendant's Exhibit 18 I offer a copy of the license effecting navigable waters and reservations of the United States, project No. 1494, issued by Federal Power Commission.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 18.

Mr. Pittle: As Defendant's Exhibit 19, I offer a copy [fol. 40] of a letter dated October 5, 1940, to the Chief of Engineers from the Secretary of the Federal Power Commission, together with endorsements.

The Commissioner: These documents will be marked for identification collectively as Defendant's Exhibit 19.

Mr. Pittle: As Defendant's Exhibit 20, I offer a copy of an order dehying application for amendment of license, on project 1494, on the application of Grand River Dam Authority, the order being dated February 19, 1941, issued by the Federal Power Commission.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 20.

Mr. Pittle: As Defendant's Exhibit 21 I offer a copy of a letter dated July 1, 1941, from Chief of Engineers to the Chairman of the Federal Power Commission.

The Commissioner: That document will be marked for identification as Defendant's Exhibit No. 21.

Mr. Pittle: As Defendant's Exhibit 22 I offer a copy of a letter dated May 18, 1942, from the Secretary of the Federal Power Commission to the general counsel of the Grand River Dam Authority.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 22.

Mr. Pittle: As Defendant's Exhibit 23 I offer a copy of a memorandum dated September 13, 1943, to the chief [fol. 41] of Engineers from the District Eningeer relating to the rules and regulations for the operation of Pensacola Dam.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 23.

Mr. Pittle: As Defendant's Exhibit 24, I offer a copy of a letter dated January 10, 1944, from the acting Chief of Engineers to Hon. Victor Wickersham.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 24.

Mr. Pittle: I want to offer as 24-A——

The Commission: The document that Mr. Pittle has just mentioned then will be marked for identification as Defendant's Exhibit 24-A.

Mr. Pittle: And as Defendant's Exhibit 24-B, I offer copy of excerpts from the testimony of Douglas G. Wright before the Flood Control Committee of the House of Representatives on June 8, 1943.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 24-B.

Mr. Pittle: And as Defendant's Exhibit 24-C a copy of a letter of December 22, 1943, from the general counsel of the Grand River Dam Authority to Hon. Victor Wickersham.

The Commissioner: It will be marked for identification as Defendant's Exhibit 24-C.

Mr. Pittle: As Defendant's Exhibit 24-D, I offer a copy [fol. 42] of a letter dated December 18, 1943, from the

general counsel of the Grand River Dam Authority to Hon. Bennett C. Clark, together with an excerpt of a press release dated December 17.

The Commissioner: These two documents will together be marked for identification as Defendant's Exhibit 24-D.

Mr. Pittle: As Defendant's Exhibit 25, I offer a copy of a letter dated March 17, 1944, from Douglas G. Wright, Administrator, Southwestern Power Administration, to the District Engineer.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 25.

Mr. Pittle: As Defendant's Exhibit No. 26, an order dismissing application for preliminary permit, issued by the Federal Power Commission in the matter of Grand River Dam Authority, and it is dated January 18, 1949.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 26.

Mr. Pittle: Defendant's Exhibit No. 27 is a copy of a letter dated August 12, 1954, from the general counsel of the Grand River Dam Authority to the Secretary of the Federal Power Commission.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 27.

Mr. Pittle: Defendant's Exhibit No. 28 is a copy of [fol. 43] an order issuing a license, on project No. 2183, in the matter of the Grand River Dam Authority, issued by the Federal Power Commission on June 22nd, 1955.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 28.

Mr. Pittle: As Defendant's Exhibit No. 29, I offer a copy of the Form L-4 issued by the Federal Power Commission entitled, Terms and Conditions of License for Unconstructed Major Project Effecting Navigable Waters of the United States.

The Commissioner: That document will be marked for identification as Defendant's Exhibit No. 29.

Mr. Pittle: As Defendant's Exhibit No. 30, copy of an order amending order issuing license, in project No. 2183, issued December 13, 1954.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 30.

Mr. Pittle: As Defendant's Exhibit No. 31, a copy of an order amending order issuing license, in project

No. 2183, issued March 22, 1957, by the Federal Power Commission.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 31.

Mr. Pittle: Now, if the Court please, as part of our evidence in the case we will be asking the Court to take judicial notice of State statutes which may be pertinent. I have never been satisfied in my own mind whether it is necessary [fol. 44] to ask the Court to take judicial notice of Federal Statutes, but if it is, I am doing it now.

The Commissioner: Very well.

Mr. Pittle: In that connection I will offer for convenience a copy of the Act of July 6, 1954.

The Commissioner: Mr. Boydstun, do you object to this being received in evidence subject to verification?

Mr. Boydstun: Do you mean the enfire—all of his exhibits?

The Commissioner: Well, no, the one he is talking about.

Mr. Boydstun: No objection to it; that is a copy.

The Commissioner: All right this statutory provision will be admitted in evidence as Defendant's Exhibit 32.

Mr. Pittle: As Defendant's Exhibit 33, a copy of a letter from Robert S. Kerr, then Governor of Oklahoma, to the Chief of Engineers, which is published in House Doc. No. 758, 79th Congress, second sess., on page 10—that is Roman X—page X.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 33.

Mr. Pittle: If the Court please, there is one other matter which I haven't been able to complete investigation on. I can state it briefly, and perhaps Mr. Boydstun can clear it up in a moment.

[fol. 45] While the present action was pending in the Court of Claims, the Grand River Dam Authority prosecuted an appeal from the Federal Power Commission's order denying an assessment for head water benefits at Pensacola. That appeal was taken to the Court of Appeals—United States Court of Appeals for the Tenth Circuit. The Court affirmed the order of the Federal Power Commission in denying the assessment, in its opinion which is dated July 12, 1957. I dont have the citation of it; I would offer the opinion for convenience—a copy

of it for convenience as an exhibit and I will call upon the plaintiff at this time to tell us w' ether Grand River Dam Authority has pending an application or petition for certiorari, or any other court proceedings because if they do, I would certainly move to dismiss the present action on the ground tha' another claim is pending.

The Commissioner: Well, first we will mark for identification a copy of the opinion and it will be marked for identification as Defendants Exhibit 34.

Mr. Boydstun, can you throw any light on the further proceedings, if any?

Mr. Boydstun: Yes, the Federal Power Commission held they had no jurisdiction and that case was not on the merits of the thing but on the question of whether the Federal Power Commission had jurisdiction and they held they did not. And we took an appeal from the order of the [fol. 46] Federal Power Commission to the Circuit Court of Appeals and they affirmed the order of the Commission and that judgment, which is reported, is final. We did not make an application for a writ, and the judgment of the Court of Appeals is a final judgment.

The Commissioner: Thank you. We will take that as a stipulation I assume.

Mr. Pittle: Yes, I will be glad to accept that as a stipulation.

The Commissioner: All right, the stipulation will be accepted.

Mr. Pittle, can you tell us whether Mr. Boydstun has been provided frequently with copies of all of these exhibits.

Mr. Pittle: I regret very much to say that all of my exhibits from, I believe, 16 on, I do not have copies of even for my own use, but he was provided with copies of I think 1 through 15.

The Commissioner: Well, we will have to afford Mr. Boydstun an opportunity to study the exhibits which he hasn't previously had—copies of, and of course I will have to study all of them since I haven't previously had an opportunity to see any of the defendant's exhibits so we will postpone Mr. Boydstun's comments with respect to all of the exhibits offered by the defendant and now marked for identification and of course I will postpone my ruling

[fol. 47] until we reach a stage of the trial when the defendant is going forward with his case in chief.

In the meantime, Mr. Boydstun, I will let you have the first opportunity to examine these exhibits that you haven't previously seen, and then when you have completed your examination I would like to get them and read them myself.

Mr. Boydstun: I think we might shorten the matter. Of course we do want to examine each one of them. I am generally familiar with all of the exhibits that have been offered from 16 on down, but at this time I think we could state for the plaintiff that we would not object to the authenticity of any of those exhibits. However we would object to them as to the admissibility, and reserve of course the right to rebut or offer some exhibits in answer to those from 16 on down.

The Commissioner: Yes. Well now when we reach the defendant's case in chief, I will give you an opportunity to state your objections to these exhibits either individually or in a group, and by that time I will have an opportunity perhaps to look over them myself and we will be in a position to rule on them. So for the moment we will let the defendant's offer of these exhibits stand in abeyance, until a later stage of the trial.

Mr. Pittle: The Court may not wish to reconsider its ruling, or its statement, but I was going to suggest that you consider whether it might not be advisable to take the [fol. 48] time now to rule on our exhibits, for this reason: That it will be our contention throughout the proceeding that any testimony contrary to or repetitious of matters contained in the exhibits would not be the best evidence of the facts asserted, for various reasons, and for that reason I would be objecting to any oral testimony along those lines, and it just occurred to me that perhaps we ought to get out of the way the question of whether the documents are admissible and constitute evidence so that you may then rule on objections that might arise. And, similarly, Mr. Boydstun might wish to make——

The Commissioner: Well, that is certainly agreeable with me and in the light of your explanation perhaps the most expeditious way of disposing of these matters which you say will arise from time to time during the plaintiff's testimony is to take such a period of recess at the present

time as may be necessary for me to look over the defendant's exhibits—that is, have we reached the stage now where the plaintiff is ready to go forward with its oral testimony; is that where we stand now?

Mr. Boydstun: I believe that is where we are placed.

The Commissioner: All right, off the record.

(Thereupon discussion was had off the record and thereafter the following proceedings were had on the record:)

The Commissioner: In order to permit all the persons present to have lunch and in order to afford Mr. Boydstun [fol. 49] and myself an opportunity to examine the defendant's exhibits, we will now recess until 2:30 o'clock.

(The recess was taken and thereafter the following proceedings were had to-wit:)

The Commissioner: The Court will come to order.

Mr. Pittle: May it please the Court.

The Commissioner: Yes, sir.

Mr. Pittle: Since our lunch and recess I have obtained copies of four more documents which I would like to offer as Defendant's Exhibits.

The Commissioner: All right, we will mark them for identification.

Mr. Pittle: Beginning with defendant's exhibit——

The Commissioner: The next number is 35.

Mr. Pittle: No. 35, a copy of a letter dated August 19, 1954, from general counsel of Grand River Dam Authority to the District Engineer.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 35.

Mr. Pittle: The next is a copy of a letter dated September 8, 1954, from the District Engineer to the general counsel, GRDA.

The Commissioner: That document will be marked for identification as Defendant's Exhibit No. 36.

Mr. Pittle: And the next is a copy of a letter dated [fol. 50] February 9, 1956, from the General Manager of GRDA to the District Engineer.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 37.

Mr. Pittle: And the next is a copy of a letter dated February 14, 1956, from the acting District Engineer to the Grand River Dam Authority, attention General Manager, together with an attachment, being a form of contract No. DA-34-066-CIVENG-56-479.

The Commissioner: Now these documents will be marked for identification together as Defendant's Exhibit No. 38.

There is a matter related to the numbering of exhibits that I should like to clarify at this time.

During the morning session it is my recollection that counsel for the defendant offered, and we marked for identification, a letter dated March 11, 1946, from the Chief of Engineers of the War Department to Mr. France Paris, the General Manager of the Grand River Dam Authority. That letter, or a copy of that letter was marked for identification as Defendant's Exhibit No. 9. During my examination of the exhibits while we were in recess I noted that there were clipped to the letter, which I have just mentioned, a copy of a communication dated February 14, 1946, from the Grand River Dam Authority, by France Paris, General Manager to the Chief of Engineers, and also [fol. 51] a copy of a second endorsement from the Division Engineer, Southwestern Division, to the Chief of Engineers. That endorsement being dated 22 March 1946.

Now I gather from the exchange of correspondence between the parties during our pretrial proceeding that the defendant probably wishes to offer also the two communications that are clipped to, or stapled to the letter of March 11, 1946.

Mr. Pittle: Yes, we do, Your Honor.

The Commissioner: I think then we will do some renumbering here with respect to that particular group of papers and we will mark for identification as Defendant's Exhibit 9-A the letter dated February 14, 1946; we will mark for identification as Defendant's Exhibit 9-B the letter dated March 11, 1946; and we will mark as Defendant's Exhibit 9-C for identification the endorsement dated 22 March 1946.

Now, Mr. Boydstun, I believe that during the noon recess you had an opportunity to examine these various exhibits with the exception of the four just offered by Mr. Pittle, those four being 35, 36, 37 and 38. Now if there are any

in this previous list that you find unobjectionable, suppose we get them in evidence without further to-do, and then we will take up one by one the exhibits that you do find objectionable.

[fol. 52] DOCUMENTARY EVIDENCE FOR PLAINTIFF

Mr. Boydstun: If the Court please, while we are correcting what we did this morning, I find that I, in my Exhibit 12, which was this photostat, I believe I stated into the record it was pages 1260 and 1261. I should have said 1215, 1216, 1217, and 1260 and 1261. I offered them all together but I didn't—in making my offer I didn't include all the pages.

The Commissioner: Is that agreeable, Mr. Pittle?

Mr. Pittle: Yes.

The Commissioner: To amend the offer?

Mr. Pittle: Certainly; and I might point out that the document itself will show the pages that Mr. Boydstun is now referring to.

The Commissioner: All right, we will then staple those pages together, and collectively they will constitute Plaintiff's Exhibit 12, which is admitted in evidence.

[fol. 53] DOCUMENTARY EVIDENCE FOR DEFENDANT

Mr. Boydstun: If the Court please, as to exhibits up to and including, I guess, 16, that is what was submitted to us in the pretrial conference, by the defendant, and if it is good enough for the record we would like to make the same admissions, and the same objections as were set out in our letter to you dated—set out in a letter to the Hon. Perry W. Morton, Assistant Attorney General, in reply to his letter of April 4, 1957, that was under your directions.

The Commissioner: Yes. Now I have in my own file a copy of that letter but my copy is not an official court document and consequently I think it would be better probably for you to read into the record at this point your objections. You can read them from your previous——

Mr. Boydstun: Okay.

The Commissioner: —letter, or, interpolate any additional comment that you wish to make.

Mr. Boydstun: I think, if the Court please, in the way Mr. Pittle offered these exhibits this morning, they did not appear in the same order in which they did in his letter of April 4.

The Commissioner: Well, I will tell you our present number because I have the documents right before me. Our Defendant's Exhibit 1 for identification is a transcript of a public hearing that was held at Vinita, Okla-
[fol. 54] homa, on June 7, 1937.

Mr. Boydstun: We admit the authenticity of that document, but object to same for the reason it is immaterial and incompetent, and doesn't tend to prove or disprove any issues in the lawsuit.

The Commissioner: Well, suppose we have Mr. Pittle now explain his theory with respect to the admissibility of this document and then I will rule on it.

Mr. Pittle: If the Court please, I am very sorry but our documents were not in chronological order or some other order, so that I could take them as a group. That transcript, or the copy of the transcript is offered by the defendant as part of its defense of estoppel, which it sets forth in its answer. It is part of our affirmative defense, and that will be one of the matters which tend to support, factual background for thaf legal defense.

The Commissioner: Do you wish to say anything further, Mr. Boydstun?

Mr. Boydstun: No, other than I might make this comment if the Court please: As I take it there are two things in that transcript which they rely on, and the first is the statement made by the former Chairman of the Board of Directors, and the other is the statement made by the then Director of the Oklahoma Planning and Resources Board. And of course under our theory of the lawsuit
[fol. 55] the Oklahoma Planning and Resources Board had no authority or jurisdiction—it is a legal question of course—over Grand River, and that George Shaefer had no authority, to bind the Committee, or authority under the sta ements that he made as contained in that record. I take it that is all of the material items, that are in that record that have anything to do with this lawsuit.

The Commissioner: Well, I will overrule the objection and admit this exhibit in evidence for the purpose of

showing that representatives of the State of Oklahoma, and of State agencies were present at that hearing and for the purposes of showing what statements they made at the hearing. Now the parties can argue in their briefs and undoubtedly will do so in considerable degree, with respect to the legal consequences, if any, flowing from the participation by these representatives of the State and of State agencies at the hearing and the various positions which they took at that time.

All right now let's take up Defendant's Exhibit No. 2 for identification, that, in our present system of numbering, appears to be a statement relating to Pensacola Reservoir, project information, prepared by the Tulsa District of the Corps of Engineers; at least that appears from the face of the document to be its nature.

Mr. Boydstun: We admit the authenticity of that document but object to its admission on the ground that it is [fol. 56] immaterial and incompetent.

The Commissioner: Well now, do you admit the truth of the various statements made in the document?

Mr. Boydstun: As I recall, that is a description of the project, how many kilowatts and so on and so forth, and the capacity.

The Commissioner: Something about the historical information—the physical description.

Mr. Boydstun: I think that is correct generally.

The Commissioner: Financial arrangements and so forth.

Well, that particular objection will be overruled, and this document is admitted in evidence as Defendant's Exhibit No. 2.

Now, No. 3 for identification, is a copy of a memorandum dated 14 April 1954, purportedly prepared by Albert E. Coldwell, on the subject of data concerning Pensacola Reservoir, and its effects on Fort Gibson Reservoir.

Mr. Boydstun: We—what was the date of that, Judge?

The Commissioner: 14 April 1954.

Mr. Boydstun: Well, we admit the authenticity of that instrument or exhibit, but object to its admission for the reason it is incompetent, irrelevant and immaterial.

The Commissioner: Do you admit the truthfulness of the statements of fact contained in that?

[fol. 57] Mr. Boydstun: Mr. Holway just calls my attention that there is some disagreement on it—but—on some of the facts, if we are thinking about the same instrument there.

The Commissioner: Well, in the absence of a concession by the plaintiff with respect to the truthfulness of the statements of fact contained in this document, we will pass over it for the time being, and it is not admitted in evidence at the present time and will not be unless there is a subsequent proper predicate laid by the defendant for its admission.

Number 4 for identification, is a two-page statement headed, "Pertinent Data, Pensacola Dam and Reservoir, Grand (Neosho) River," dated September 1955.

Mr. Boydstun: Well, we admit the authenticity of that exhibit and we have no way of knowing whether all the statements are true or not, but therefore we have to deny——

The Commissioner: All right.

Mr. Boydstun: It is immaterial, incompetent and irrelevant.

The Commissioner: —for the time being the objection to Defendant's Exhibit 4 for identification is sustained. However that does not prevent the defendant from subsequently re-offering it on the basis of a proper predicate having been laid.

Defendant's Exhibit No. 5 for identification is a copy [fol. 58] of an order entered by the Federal Power Commission on April 27, 1953, presumably—at least it purportedly was issued on April 27, 1953, although adopted on April 27th—I'm sorry.

Mr. Pittle: The other way around.

The Commissioner: I will correct my statement: An order purportedly was issued on April 27, 1953, although adopted on April 23, 1953. It is an order on project No. 1494, in the matter of the Grand River Dam Authority.

Mr. Boydstun: Is that relative to the costs, Mr. Pittle?

Mr. Pittle: No, sir, if you are asking the purpose I am offering it, it is this: It is to show, in support of our assertion, in our defense—in our answer that this project was licensed by the Federal Power Commission, to show all the terms and conditions of the license, and so that I can

ask the Court to take judicial notice of the law relative to Federal Power Commission, and the conditions under which licenses are issued.

The Commissioner: In answer to your question, Mr. Boydstun, it does appear to be an order determining actual legitimate original cost of an initial project, net changes therein, and prescribing accounting therefor.

Mr. Boydstun: We admit the authenticity of the exhibit. However as to the figures in there and the amount there is some dispute as between the Authority and the Power [fol. 59] Commission. However that order became final, as I recall—however, we think it is immaterial, irrelevant and incompetent.

The Commissioner: I will overrule the objections to this document and admit it for the purpose of showing what the Commission found and what the Commission ordered at the time in question.

Mr. Pittle: Do I understand if the Court please, that that ruling permits the parties to argue the finality of this in the event my pleading is amended, and these figures should come into question?

The Commissioner: Well, for the moment I am admitting it to show that the Federal Power Commission made certain findings; what those findings are; and what the Federal Power Commission ordered upon the basis of those findings.

Mr. Boydstun: As by way of comment, in connection with that, if the Court please, I think that has been amended since then too, or modified to some extent.

The Commissioner: Well, we might find those modifications later on in the documents.

Defendant's Exhibit 6-A for identification appears to be a copy of an order issued by the Secretary of the Interior on August 31, 1943, and effective on September 1, 1943, creating in the Department of the Interior an agency to be known as the Southwestern Power Administration.

Mr. Boydstun: We admit the authenticity of that ex- [fol. 60] hibit but object to its admission for the reason it is incompetent and immaterial and irrelevant. The Grand River Dam Authority was not a party to that action and had no interest in the transaction. It was between two Federal agencies, changing the Federal Works Adminis-

tration—taking the power from the Federal Works Administration to the Interior and setting up Southwestern Power Administration, an independent Government bureau. The Authority had no relations with——

The Commissioner: Mr. Pittle, will you tell us about the relevancy of this document?

Mr. Pittle: If the Court please, the license which was issued by the Federal Power Commission to Grand River Dam Authority provided, among other things, that the project was licensed for a term of fifty years, subject to being acquired at any time by the United States under certain conditions. Certain conditions came about under which the United States acquired the project for a temporary period and turned it over for administration to the Southwestern Power Administration. This is to show that line of legislative and executive directives which brought that about.

The Commissioner: All right, we will admit this document in evidence. The plaintiff's objection being overruled for the purpose of showing an action taken by the Secretary of the Interior, in the historical chain of events [fol. 61] having bearing on this controversy.

Next we come to defendant's exhibit 6-B for identification which purports to be a copy of executive order 9366; that is an order——

Mr. Boydstun: Well, that is the same situation as the other; that is another executive order involved in the transfer of the power from one Government agency to the other, as I recall. And we object to it for the same reason that we did to the other exhibit.

The Commissioner: I assume, Mr. Pittle, the purpose of this particular document is similar to the one you stated a moment ago.

Mr. Pittle: That's correct.

The Commissioner: I will overrule the objection and admit this document in evidence as Defendant's Exhibit 6-B for the purpose of showing an action taken by the president.

Then we come to Defendant's Exhibit 6-C for identification, which is a copy of another executive order, this one being number 9373.

Mr. Boydstun: Well, that is the same situation, if the Court please, as the other two.

The Commissioner: All right, I will overrule the objection to this document and admit it in evidence as Defendant's Exhibit 6-C, again for the purpose of showing an official action taken by the president that seems to have some rele-
[fol. 62] vant relationship to the controversy now before the Court. We next come to Defendant's Exhibit No. 7, for identification, which is a copy of a transcript of a public hearing that was held in Muskogee, Oklahoma, on January 27, 1942, relative to the Fort Gibson Reservoir, on the Grand (Neosho) River, Oklahoma.

Mr. Boydstun: We admit the authenticity of this exhibit but object to its introduction for the reason that it is incompetent, irrelevant and immaterial.

The Commissioner: Mr. Pittle, I ~~have~~ glanced over this during the noon recess and I had a little difficulty in locating anybody here who might appear to be authorized to speak for the Grand River Dam Authority. Will you elucidate on that?

Mr. Pittle: This exhibit shows a statement by the Chief Engineer of the Grand River Dam Authority and we will try to pick out the page on which that appears, for convenience; and it is offered in connection—in support of our defense of estoppel; I believe on page 34 at the bottom of the page, a paragraph beginning "W. C. Burnham, Chief Engineer, Grand River Dam Authority, Vinita, Oklahoma: I would register as representing a public works agency. Mr. Wright, Director of the Grand River Dam Authority, Pensacola Reservoir, was unable to be here, as he was called to Washington." And then, so on.

Mr. Boydstun: Those people did not represent either [fol. 63] the State of Oklahoma or the Grand River Dam Authority. Burnham was merely an engineer for the Authority, but at that time he was with the Southwestern Power Administration, or Federal Works—they were representing the Federal agency.

Mr. Pittle: Then I believe this transcript also contains on page 22 statements by the Director of the Oklahoma Planning and Resources Board, which we have asserted in our answer as constituting the basis for authority, if any were needed.

Mr. Boydstun: Under our theory the Oklahoma Planning and Resources Board, on the date of that report, had no jurisdiction over the Grand River Dam; neither did they represent the Grand River Dam Authority.

The Commissioner: On what page does that statement appear?

Mr. Pittle: I believe it is 22, Your Honor, at the bottom of the page, "Don McBride, Director, Oklahoma Planning and Resources Board, Oklahoma City, Oklahoma," and then he proceeded to make a speech.

The Commissioner: Well, I will overrule the objection and admit this document in evidence for the purpose of showing that the Director of the Oklahoma Planning and Resources Board appeared at the hearing, participated in the hearing, and made a statement for the record, and for the purpose of also showing what his statement was. Now in that connection I am wondering whether we ought not [fol. 64] to correct the Commissioner's Exhibit that we passed on earlier this morning, because as I recall it there is a paragraph in there with respect to the Chief Engineer of the Southwestern Power Administration, appearing at this same hearing and I assumed at the time, and nothing to the contrary was said, that the man who appeared actually was the Chief Engineer of the Southwestern—of the Grand River Dam Authority during the period of operation of the facility by the Authority itself and not by the United States.

Mr. Boydstun: I didn't observe that.

The Commissioner: May I see that Commissioner's Exhibit, please?

The particular reference is the last sentence of paragraph 10 of Commissioner's Exhibit No. 1 and I assume now that the statement in that sentence refers to the same meeting that is involved in Defendant's Exhibit No. 7—is that right?

Mr. Pittle: I believe that is correct. And the fact is——

Mr. Boydstun: Exhibit No. 1 was your—was a transcript of a hearing had on June 7, 1937, wasn't it, in Vinita, Oklahoma?

Mr. Pittle: That is Defendant's Exhibit 1, yes, sir.

Mr. Boydstun: Of course this thing we are talking about now was down at Muskogee, wasn't it?

The Commissioner: Well, the hearing that we are talk-
[fol. 65] ing about now was at Muskogee on January 27, 1942.

Mr. Boydstun: They are two separate things—Defendant's Exhibit 1 is that meeting in June 1937.

The Commissioner: Yes. Well now I am trying to find out whether the hearing that is referred to in Commissioner's Exhibit 1, paragraph 10, is the same hearing that is involved in Defendant's Exhibit No. 7, for identification.

Mr. Pittle: That is correct.

The Commissioner: That's right. I am also trying to find out if we are all agreed that the United States was actually operating the facility at that time.

Mr. Pittle: That is my understanding, yes, sir. But Mr. Burnham, as described, was the Chief Engineer of Grand River Dam Authority although at the same time representing—occupying the same position in the Southwestern Development——

Mr. Boydstun: Mr. Burnham was never Chief Engineer for the Authority; in that part of it you are in error.

The Commissioner: Well, since there seems to be some question about his authority to speak for the plaintiff at that time, I am going to correct the Commissioner's Exhibit 1 at this time by striking out the last sentence of paragraph 10.

Now, to get back to Defendant's Exhibit No. 7, that exhibit is admitted in evidence merely for the purpose of showing the participation in the hearing by the Director of the Oklahoma Planning and Resources Board. De-
[fol. 66] fendant's Exhibit No. 8 for identification is a copy of a letter dated 6 January 1944, from the Chief of Engineers to the general counsel of the Grand River Dam Authority.

Mr. Boydstun: We admit the authenticity of that exhibit, and object to it as being incompetent, irrelevant and immaterial.

The Commissioner: I will overrule the objection and admit this document as Defendant's Exhibit No. 8, for the purpose of showing the position taken by the Chief of Engineers, leaving to the attorneys in the case the question of arguing, in extenso, the question of whether the position was correct or incorrect.

Next we have the group of documents that we re-numbered at the beginning of the afternoon session as 9-A, 9-B and 9-C, defendant's exhibits, the series beginning with a letter dated February 14, 1946, from the Grand River Dam Authority by France Paris, General Manager to the Chief of Engineers; and then in 9-B, we have what purports to be a reply by the Chief of Engineers to that letter; and in 9-C we have a second endorsement dated March 22, 1946, from the Division Engineer of the Southwestern Division to the Chief of Engineers.

Mr. Boydstun: We have no objection, if the Court please. I think that the first exhibit—the first part of that exhibit is our exhibit 8, the same thing as our exhibit 8.

The Commissioner: All right. Without objection then [fol. 67] these three documents are admitted in evidence as Defendant's Exhibits 9-A, 9-B, and 9-C, respectively.

Defendant's Exhibit No. 10 for identification appears to be a project report relating to the Fort Gibson Dam and Reservoir project. It is dated June 1946, revised August 1946, and apparently was prepared by the Corps of Engineers Office in Tulsa, Oklahoma.

Mr. Boydstun: We admit the authenticity of the exhibit but we are uninformed and do not know whether the contents thereof is correct; therefore we object to its introduction for the reason that it is incompetent, immaterial and irrelevant.

The Commissioner: Do you want to say something, Mr. Pittle?

Mr. Pittle: If the Court please, this is offered mostly for two purposes, to show some of the history leading to the Fort Gibson Dam and Reservoir project construction, the historical statements in it, and secondly, to show the physical description of the project. We of course have available engineers who can testify from first-hand personal knowledge as to the correctness of the data in the project report if necessary.

The Commissioner: For the time being I will sustain the objection to that document.

Defendant's Exhibit No. 11 is the statement which is [fol. 68] headed, Pertinent Data, Fort Gibson Dam and Reservoir, Grand (Neosho) River, Oklahoma, and is dated September 1955.

Haven't we had a similar document earlier in this series?

Mr. Pittle: We had one relating to Pensacola, didn't we?

The Commissioner: Perhaps so—yes, I have found it now; the other one related to the Pensacola project.

Mr. Boydstun, what do you say?

Mr. Boydstun: That is September '55?

The Commissioner: Yes, sir.

Mr. Boydstun: Well, the same—we admit the authenticity of the exhibit but we are uninformed as to the correctness of the report; we therefore object to it for that reason and for the further reason that it is incompetent, irrelevant and immaterial.

The Commissioner: Well, for the time being I will sustain the objection to this document.

Next, we come to Defendant's Exhibit No. 12 for identification which appears to be a copy of the contract for flowage easements and conveyance of rights-of-way between the Grand River Authority and United States represented by the Chief of Engineers.

Mr. Boydstun: May I inquire—I want to be sure that I am thinking about the right thing—is that the—Mr. Pittle, [fol. 69] is that the contract for the relocation of the line?

Mr. Pittle: Yes, along with flowage easements and—conveyance of flowage easements and relocation——

Mr. Boydstun: It is on the same contract?

Mr. Pittle: Yes, sir.

Mr. Boydstun: We admit the authenticity of the exhibit, and admit—agree to its admission for the purpose of showing that none of the rights claimed in this lawsuit were covered in that transaction.

The Commissioner: Well, I will admit the document in evidence and then you can argue the effect of it. It is admitted as Defendant's Exhibit 12.

Defendant's Exhibit No. 13 appears to be a copy of a petition by the Grand River Dam Authority filed with the Federal Power Commission and seeking an order determining and fixing the charges to be paid to the petitioner for the benefit of the storage and the head water improvement at the Pensacola Power project.

Mr. Boydstun: We admit the authenticity of the exhibit and the correctness of the contents thereof but object to its admission for the reason it is incompetent, irrelevant, and immaterial.

The Commissioner: Mr. Pittle——

Mr. Pittle: If the Court please, we offer this document in evidence as an admission against interest on the part [fol. 70] of Grand River Dam Authority, for whatever purposes the Court may find the facts or allegations will support.

The Commissioner: I will overrule the objection and admit this document in evidence as Defendant's Exhibit 13.

Defendant's Exhibit No. 14 for identification appears to be a communication or a copy of a communication dated 17 March 1953, prepared on behalf of Major-General Sturgis and addressed to the Division Engineer, Southwestern Division, at Dallas, Texas, together with a large number of endorsements.

Mr. Boydstun: If the Court please, we admit the authenticity of the exhibit but the exhibit consists of communications and inter-communications, between the Department of the United States to which Grand River Dam Authority was not a party and therefore we object to them as being incompetent, irrelevant and immaterial.

The Commissioner: Mr. Pittle.

Mr. Pittle: If the Court please, one of the terms and conditions of the license under which Federal Power Commission permitted the plaintiff to operate Pensacola was that the Secretary of War would direct the operation for flood control and navigation purposes. That provision is incorporated in the law generally. This series of documents shows the course of action taken by the Department of the Army in determining or in starting to determine what would be reasonable requirements for the regulation of Pensacola Dam under the powers conferred upon the [fol. 71] Secretary of War, and subject to the provisions of the license under the Federal Power control—Federal Power Commission Legislation.

Mr. Boydstun: We think it is purely self-serving intercommunication between them, themselves.

The Commissioner: It seems to me that any official action taken by the Secretary of War in pursuance to that authority might very well be pertinent and admissible as part of the background of the case, but I am inclined to agree with Mr. Boydstun that the inter-agency discussions with respect to it are not properly admissible.

Mr. Pittle: Well, we propose of course to ask in our briefs that judicial notice be taken of the regulations which were issued and this is what the Secretary considered before issuing——

The Commissioner: For the time being I will sustain the objection to this particular series of documents.

We now come to Defendant's Exhibit for identification No. 15-A, which is a copy of a communication prepared on behalf of Major-General Sturgis and addressed to the Division Engineer, Southwestern Division, at Dallas, Texas, dated 12 May 1954, and relates to the subject of head water benefits to the Fort Gibson project.

Mr. Boydstun: We admit the authenticity of that exhibit but it is inter-office, or inter-department communication, which is self-serving, incompetent, irrelevant and immate-
[fol. 72] rial so far as the issues here are concerned.

The Commissioner: I think we might discuss along with that particular exhibit the others in this same series, of 15-B, et cetera, down to and including 15-L. The communications from 15-B to 15-F inclusive, apparently being endorsements to the communication we have numbered as 15-A; do you make the same objection?

Mr. Boydstun: Same objection and comments.

Mr. Pittle: If the Court please, now as to these documents, they are largely communications between departments. The record will show that the plaintiff submitted the claim to the Federal Power Commission and requested it to assess head water benefits against the Fort Gibson project. These documents revealed and show the results of the application submitted by the plaintiff leading to the denial by the Federal Power Commission, and which later became the subject of an appeal to the Court of Appeals.

Mr. Boydstun: Well, that was another communication—inter-office communication between the Government agencies and not with the Authority.

The Commissioner: I think here, as in connection with the matter that we were talking of a moment ago, that the official action taken on behalf of the United States with respect to this petition for head water benefits is properly admissible, but the various communications between differ-
[fol. 73] ent parts of the Corps of Engineers, preliminary to formulating a position on the part of the Corps of Engineers, do not seem to me properly admissible. Therefore

I shall again sustain defendant's objection to these documents——

Mr. Boydstun: I might further——

The Commissioner: The plaintiff's objections, excuse me, to these documents.

Mr. Boydstun: I might further make this observation, if the Court please: As stated this morning, that matter has become a final judgment of the Court of Appeals involving all of those matters, which is binding on all of us.

The Commissioner: All right. Thank you.

Mr. Boydstun: It was a jurisdictional question, not on the merits of the head water question.

The Commissioner: All right. Next we have a document that we have marked for identification as Defendant's Exhibit 16-A, being a copy of a motion apparently filed by the Grand River Dam Authority in a proceeding before the District Court of the United States for the Northern District of Oklahoma, No. 2116 Civil.

Mr. Boydstun: We admit the authenticity of that and also the correctness of its contents. But object to its introduction for the reason that it is incompetent, immaterial and irrelevant.

The Commissioner: I will overrule that objection and [fol. 74] admit the document inevidence as Defendant's Exhibit No. 16-A.

The document previously marked for identification as Defendant's Exhibit 16-B is a companion document and is a copy of an application apparently submitted by the Grand River Dam Authority in the same proceeding, an application being for a distribution of compensation.

Mr. Boydstun: Well, the plaintiff has no objection to this exhibit with this comment: That those cases are still pending in the District Court in the Northern District of Oklahoma, and awaiting trial or disposition.

The Commissioner: All right, this document then is admitted in evidence without objection as Defendant's Exhibit 16-B.

Defendant's Exhibit 17 for identification is a copy of an order dated January 27, 1939, issued by the Federal Power Commission on the application of the Grand River Dam Authority in connection with project No. 1494.

Mr. Boydstun: The plaintiff has no objection to that—

the orders of the Federal Power Commission leading up to the issuance of the license on the Pensacola project.

The Commissioner: Without objection this document is admitted in evidence as Defendant's Exhibit 17.

Defendant's Exhibit 18 for identification appears to be a copy of a license issued by the Federal Power Commis-
[fol. 75] sion to the Grand River Dam Authority in connection with project 1494.

Mr. Boydstun: No objections to that, if the Court please; that is our Pensacola license.

The Commissioner: Without objection this document is admitted in evidence as Defendant's Exhibit No. 18.

Defendant's Exhibit No. 18 for identification is a copy of a communication purportedly sent by the Secretary of the Federal Power Commission to the Chief of Engineers under date of October 5, 1940, together with numerous endorsements and enclosures.

Mr. Boydstun: We admit the authenticity and the correctness of the contents thereof, but object to its admission for the reason that it is incompetent, irrelevant and immaterial.

The Commissioner: That objection is overruled, and the document is admitted in evidence as Defendant's Exhibit No. 19.

Defendant's Exhibit No. 20 for identification—

Mr. Boydstun: The same admission and the same objection, if the Court please, as to 19.

The Commissioner: All right, the objection is overruled and this document is admitted in evidence as Defendant's Exhibit 20.

Defendant's Exhibit 21, for identification, appears to be [fol. 76] a copy of a letter dated July 1, 1941, from the Chief of Engineers to the Chairman of the Federal Power Commission.

Mr. Boydstun: If the Court please, we admit the authenticity of the exhibit but that is self-serving, and a communication between the two governmental agencies concerning the operation of the Pensacola Reservoir for flood control; and we think it is incompetent, irrelevant and immaterial on this matter.

The Commissioner: How would the position taken by the Corps of Engineers really be significant, Mr. Pittle?

The really important thing was the action taken by the Federal Power Commission on the application, wasn't it?

Mr. Pittle: May I see the document a moment?

The Commissioner: Yes.

Mr. Pittle: I don't have copies of these that you are now referring to.

Yes, the significant thing would be the action finally taken, by the Federal Power, but that is offered, as are some others, to show that since the license was issued, subject to the right of the Secretary of War to regulate the flow and storage for the purposes of flood control, and navigation, the views of the Secretary of War were requested before the Federal Power Commission acted as I understand it.

The Commissioner: Well, I don't suppose we have any controversy here or any contention about——

[fol. 77] Mr. Boydstun: No, I think we have a statute, if the Court please, which gives the Corps of Engineers the authority to regulate the flood control features of any dam that the Government has put any money in, generally speaking. And that was what was involved in the writing of these detailed regulations as to the operating of this project, with others. There is no controversy about the correctness of it.

Mr. Pittle: And that is offered, further, to show that the regulation was undertaken by the Government at that early period.

The Commissioner: I do find a statement in here with respect to the issuance of regulations here.

Now tell me again your theory as to how that has a bearing on the litigation?

Mr. Pittle: Well, we have contended among other things that the Grand River Dam Authority does not own the water, and that it doesn't have the exclusive rights in it. The document, such as Defendant's Exhibit 21 for identification, is offered to show that we did exercise control—regulation over these very waters.

Mr. Boydstun: Flood control, but not for electric power and energy.

Mr. Pittle: Well, of course that would be another question; I'm not trying to say that it was for any other purpose.

[fol. 78] The Commissioner: Then the gist of the exhibit from your standpoint is that part beginning near the middle of page 2, stating as follows:

"In pursuance of the authority conferred on him by Articles 13 and 14 of the license, quoted above, the Secretary of War approved the following regulations of June 24, 1941, conferring on the District Engineer, Tulsa, Oklahoma, the necessary power of control over the pool levels:"

And then specifying in detail, what the regulations were.

Mr. Boydstun: The regulation covering the flood control pool, and not the power pool of the Pensacola Reservoir.

The Commissioner: I will overrule the objection and admit this document in evidence as Defendant's Exhibit No. 21, since, as I understand it, there is no question as to the correctness of that statement.

Mr. Boydstun: No, there is none.

The Commissioner: Next, we have Defendant's Exhibit 22 for identification, being a copy of a letter dated May 18, 1942, from the Secretary of the Federal Power Commission to the general counsel of the Grand River Dam Authority.

Mr. Boydstun: Well, we have no objections to that, if the Court please. I believe that really helps us; it shows the Government claims no interest in controlling——

Mr. Pittle: I will be willing to argue with you about [fol. 79] that, at the appropriate time, sir.

Mr. Boydstun: No objection.

The Commissioner: Well, without objection this document is admitted in evidence as Defendant's Exhibit 22.

Defendant's Exhibit 23 for identification appears to be a copy of a communication dated 13 September 1943, from Colonel F. J. Wilson, a District Engineer, somewhere.

Mr. Boydstun: Here in Tulsa.

The Commissioner: At Tulsa, to the Chief of Engineers, on the subject of rules, regulations, and so forth.

Mr. Boydstun: If the Court please, the exhibits 23, 24-A, 24-B, 24-C, 24-D, and 25, are all—the authenticity of those exhibits is admitted, but we think they are incompetent and immaterial in this lawsuit because all of them involve controversies arising between the two Governmental agencies as to the operation of the Pensacola Reservoir for—during the flood of 1943, at which time the project was

being operated by the Southwestern Power Administration. And the correspondence there with the general counsel of the Authority would only affect the Authority. Somebody was trying to blame the Authority for operating it in a poor manner during that flood. I don't believe any of that is material or competent in this lawsuit.

The Commissioner: Mr. Pittle?

Mr. Pittle: Among other things, if the Court please, [fol. 80] we offer these documents to show that the Federal Government exercised its right to regulate the stream during this period and that the regulations were changed when Southwestern Power took over because of the fact that it was a Governmental agency. The regulations previously in force were directed to regulation or operation by GRDA, and it became necessary when Southwestern Power was created and took over the operation to alter those regulations. And they were. That line of documents referred to by Mr. Boydstun I believe relates to those matters and it shows a continued regulation.

The Commissioner: During the period when the Southwestern Power Administration operated the facility?

Mr. Pittle: That's correct, and insofar as some of them are correspondence between GRDA and any of its officers, and the Federal, or executive, or executive parts of the Government, we believe that they may be admissible as statements against interest.

Mr. Boydstun: Well, as I said, to clarify those matters, if the Court please—which I believe has not been brought out here,—the United States took possession of the Grand River Dam properties under an executive order on November 1, 1941, and operated the project until September 1, 1946, and during that period we had the largest flood on record—in history, on the—on the Grand River, in May 143. And at that time the Southwestern Power Adminis- [fol. 81] tration was operating the project under that executive order, and a controversy arose between the Southwestern Power Administration and the Corps of Engineers as to whether or not—as to how the power pool would be maintained. And during the controversy there was a lot of adverse newspaper stories criticizing the Grand River Dam Authority. They had nothing to do with it. And of

the—the general counsel, in these letters that he had here, was just trying to straighten out the unfavorable publicity.

The Commissioner: Well, I see that Defendant's Exhibit No. 23 is a communication from a Colonel in the Corps of Engineers to the Chief of Engineers. And I don't believe that, since—sufficient showing has been made to establish its admissibility; therefore I shall sustain the objection to it.

Similarly, in the case of Defendant's Exhibit for identification No. 24-A, that being a letter from the acting Chief of Engineers to the Hon. Victor Wickersham, a member of Congress at the time.

Now in connection with Defendant's Exhibit 24-B, for identification, I assume Douglas G. Wright, the person involved here, was the Administrator of the Southwestern Power Administration at the time, is that right?

Mr. Pittle: Yes, that's correct.

Mr. Boydstun: Yes.

[fol. 82] The Commissioner: I will sustain the objection to that document also for the time being.

We come then to Defendant's Exhibit No. 24-C for identification, a letter apparently written by the General-Counsel of the Grand River Dam Authority to Mr. Wickersham. Now Mr. Pittle, do you have a copy of that? Will you point out the portion of that that you regard as an admission by the official of the plaintiff?

Mr. Pittle: Well, in the center of the second—the middle paragraph, the assertion that, as a matter of fact, while the Authority was operating this reservoir during 1941, and up until the advent of Federal control on November 21 of that year by directive of the President, and so forth, which recognizes the exercise by the Federal Government of its prerogative to take over the project and operate it. And I did not know when I offered these whether I was going to have a controversy about that point, and I believe that that tends to establish it.

Mr. Boydstun: We admit, just for the information of the Court and all, that the Federal Government operated this project for that period of November 1941 until September 1, 1946, pursuant to the Federal Power Act and pursuant to the license issued to us, which was in the nature of a contract, and that the Government did control

the waters during that period in which they had possession of it.

[fol. 83] The Commissioner: Well, I will admit this in evidence for the purpose of the statement mentioned by Mr. Pittle a moment ago, as an admission properly establishing the fact that the interest of the Authority in connection with this litigation, that is, Defendant's Exhibit No. 24-C, and it is admitted in evidence to the limited purpose that I mention.

Now, Mr. Pittle, here we have another letter from the general counsel of the plaintiff to the then Senator Clark, dated December 18, 1943; we have marked that for identification as Defendant's Exhibit No. 24-D.

Mr. Pittle: That exhibit—well, simply, this one is another letter in the chain, which is all under Defendant's Exhibit No. 24, relating to the same subject matter.

The Commissioner: Well, can you point out any admissions that you think are pertinent here.

Mr. Pittle: Beginning with the second paragraph, the Federal Power license, issued to the Grand River Dam Authority under date of July 26, 1939, and so forth, provides—and then there is a quotation; and it goes on for several sentences, showing the recognition of the provision that I mentioned before—giving the Federal Government the right to operate the project.

The Commissioner: Well, it will be admitted in evidence for that limited purpose, I am referring now to [fol. 84] Defendant's Exhibit 24-D.

As to Defendant's Exhibit No. 25 for identification that appears to be a copy of a letter from the Administrator of the Southwestern Power Administration to the District Engineer at Tulsa, dated March 17, 1944.

I will consider that inadmissible and sustain the objection to it.

Next, we have Defendant's Exhibit No. 26 for identification, which is a copy of an order dated January 18, 1949, of the Federal Power Commission, in connection with project No. 1954, the order being a dismissal of an application for preliminary permit, previously filed by the Grand River Dam Authority.

Mr. Boydstun: We admit the authenticity of this exhibit

but object for the reason it is incompetent, irrelevant and immaterial.

The Commissioner: I will overrule the objection and admit this document in evidence for the purpose of establishing what the Commission found, and what is ordered in that proceeding.

Defendant's Exhibit 7 for identification is a copy of a letter dated August 12, 1954, from the Grand River Dam Authority to the Secretary of the Federal Power Commission.

Mr. Boydstun: No objection.

The Commissioner: No objection; this instrument is [fol. 85] admitted in evidence as Defendant's Exhibit No. 27.

Defendants's Exhibit No. 28 for identification is a copy of an order issued by the Federal Power Commission on June 22nd, 1955, in connection with the project No. 2183.

Mr. Boydstun: If the Court please, on 27, 28, 29, 30, and 31—down to 31—including Exhibit 31, the Authority admits all of those—the authenticity of all of those exhibits and the correctness of them, that being the orders and licenses for the Markham Ferry project, but object to the admission of them because it is irrelevant, incompetent and immaterial for the purposes of this lawsuit.

The Commissioner: That objection is overruled and these documents are admitted in evidence as Defendant's Exhibits No. 28 to 31, respectively.

32 has already been admitted in evidence.

So we come them to Defendant's Exhibit 33 for identification, being a copy of a letter dated September 25, 1945, from the then Governor of Oklahoma, Robert S. Kerr, to the Chief of Engineers.

Mr. Boydstun: We admit the authenticity of this exhibit, but we object to its introduction for the reason that it is incompetent, irrelevant and immaterial, and is indefinite as to the issues in this lawsuit.

The Commissioner: The objection is overruled.

Mr. Pittle: I wanted to hear—I didn't hear the last [fol. 86] part of the objection—pardon me.

The Commissioner: And the document is admitted in evidence as Defendant's Exhibit No. 33.

Defendant's Exhibit No. 34, for identification, appears to be a copy of a decision rendered by the United States Court of Appeals for the Tenth Circuit on July 12, 1957, in a case entitled, Grand River Dam Authority, against Federal Power Commission, No. 5549.

Mr. Boydstun: We have no objection, if the Court please. I might make this observation: That is a final judgment and there has been no appeal, no application for writ of certiorari.

The Commissioner: Without objection this document is admitted in evidence as Defendant's Exhibit 34.

Now that brings us to the four documents that Mr. Pittle presented at the beginning of the afternoon session. I don't have copies of them myself and haven't seen them. Have you had opportunity to——

Mr. Boydstun: Yes, sir; I gave them to Mr. Holway to check.

The Commissioner: All right. We will have a brief recess then while plaintiff examines them. Suppose we have a ten minute recess.

(Thereupon a ten minute recess was taken and thereafter proceedings had as follows:)

[fol. 87] The Commissioner: The Court will come to order.

Mr. Boydstun, we will now hear you with respect to Exhibits 35 to 38, inclusive.

Mr. Boydstun: Plaintiff admits the authenticity of those exhibits and the correctness of the contents, but objects to the introduction because they are immaterial, irrelevant and incompetent.

The Commissioner: That objection is overruled and the four exhibits are admitted in evidence under the numbers previously indicated. I believe that we have now concluded the initial consideration at least of the documentary evidence and we are ready to proceed with the hearing of testimony from the witnesses.

And, thereupon, pursuant to the order of reference by the Honorable, the United States Court of Claims, in the above-entitled cause, testimony on behalf of the plaintiff and defendant was taken as follows:

[fol. 88] TESTIMONY FOR PLAINTIFF

The Commissioner: Will the plaintiff call its first witness.

Mr. Smith: This witness has not been sworn.

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W. R. HOLWAY, a witness produced on behalf of the plaintiff, having first been duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

The Commissioner: Will you have a seat, please, and give the reporter your name and address.

A. W. R. Holway, 1850 South Boulder, Tulsa.

Direct examination.

By Mr. Smith:

Q. Mr. Holway, in what profession are you engaged?

A. Engineering.

Q. And how long have you been engaged in that profession?

A. Since 1915.

Q. Are you a graduate of an accredited school of engineering?

A. Yes, sir, Massachusetts Institute of Technology.

Q. And during the past many years have you specialized to a great extent in hydraulic engineering?

A. Almost entirely.

Q. During what period of time?

Mr. Pittle: We will concede his qualifications.

[fol. 89] Mr. Smith: I would like for the record to show them, please.

Mr. Pittle: All right.

Q. (By Mr. Smith) During what period of time?

A. Since 1915 to the present.

Q. Have you been in charge and did you develop the Spavinaw Dams and the Tulsa water supply, through the building of dams and through hydraulic engineering, carrying the water into the City of Tulsa?

A. Yes, sir.

Q. And are you presently engaged by the City of Tulsa as a consulting engineer for the purpose of providing such additional water supplies as may be needed?

Mr. Pittle: I object to the continued leading; I was willing to concede the witness' qualifications, but if he is going to testify, I ask that he do so.

The Commissioner: Well, I think a certain amount of leading may be helpful in expediting the testimony.

Mr. Smith: I think this is preliminary, your Honor.

The Commissioner: Go ahead—do you recall the question?

A. Yes, sir.

Q. (By Mr. Smith) Your answer was, yes, sir?

A. Yes, sir.

Q. Are you now employed in any capacity by the Grand [fol. 90] River Dam Authority?

A. Yes, sir, under contract since 1937.

Q. And it what capacity is that?

A. We have two capacities. We act as consultants on operations of the project, and we have a contract for the construction—engineering and construction of Markham Ferry Dam, and system improvements.

Mr. Smith: At this point, if the Court please, and for the purpose of the record, I should like to ask that you take judicial notice of all the statutes of the State of Oklahoma, which apply to the authorization and management of the Grand River Dam Authority.

The Commissioner: Yes, the Court will take judicial notice of all the pertinent State statutes, but it would be helpful if counsel would furnish an up-to-date compilation of the pertinent statutes.

Mr. Smith: We will be glad to furnish them, Your Honor, to you both.

Mr. Pittle: Thank you.

Mr. Smith: With copies of the pertinent statutes.

The Commissioner: Thank you.

Q. (By Mr. Smith) Mr. Holway, beginning with your employment in '37, and in the light of the remarks I have made to the Court, was that after the original act authorizing and creating the Grand River Dam Authority had been passed?

[fol. 91] A. Two years after, yes, sir.

Q. In other words, it was passed in 1935?

A. Yes, sir.

Q. A short time after your employment as consulting engineer were you or were you not requested to make a study and surveys of the waters of Grand River and its tributaries in view of determining the advisability of hydroelectric projects thereon?

A. Yes, sir, we were; our contract at that time provided for the construction of the Pensacola Dam, planning, design and construction. But six months after this contract was signed we were asked by the management and the Board of Directors to study the possibilities of adding the Markham Ferry and Fort Gibson dams to the Public Works Administration loan-and-grant agreement that covered only Pensacola.

Q. Did you make such a study pursuant to that request?

A. Yes, sir, we made surveys, borings, plans and estimates of costs of both dams.

Q. And were your surveys and findings contained in a map that was then prepared by you and your associates?

A. We prepared a map at that time which showed the location of the three reservoirs and the connecting transmission line.

Q. I hand you a copy of what has already been introduced by the plaintiff in evidence, the same being a map of the three reservoirs, and, if you can arrange yourself where you——

Mr. Boydstun: I believe that is Plaintiff's Exhibit 9.

The Commissioner: The map has previously been [fol. 92] marked for identification as Plaintiff's Exhibit No. 9.

Q. (By Mr. Smith) I notice on here, Mr. Holway, that there appear three different lakes; will you describe them to the Court.

A. The upper one is Pensacola Reservoir.

Q. Designate that, please.

A. Pensacola Dam being here, and Markham Ferry Dam in the middle of the river, the dam being here, the reservoir back to Pensacola, and the Fort Gibson Dam, backing water up to the Markham Ferry——

The Commissioner: You are beginning up-river and going down stream?

A. Yes, sir.

Q. (By Mr. Smith) This map, the portion of which that you have designated and referred to, was made when, please, sir?

A. In 1939.

Q. By your office?

A. Yes, sir.

Q. Will you please advise the Commissioner why you are positive as to the date on which it was made?

A. Well, because the man that made it left my office in January 1940.

Q. Mr. Holway, I note on this map several other markings showing transmission lines and other facilities, and [fol. 93] also showing your engineer stamp, and your number. Was that contained on the original map which was prepared in 1939?

A. The only thing that was on the original map in 1939 was the three reservoirs as described, and the transmission line to be built, one hundred fifteen thousand volt line to be built from Pensacola down to Markham Ferry and down to Fort Gibson, with the Markham Ferry switching station, and the other lines have been added—were added in 1947, when this became an exhibit in Federal Court, I think on condemnation of lands at Markham Ferry, by the Government.

Q. In other words, if I understand it correctly, and I would like for the Commissioner to understand this, this exhibit that was introduced as Exhibit No. 9 by the plaintiff contains data that wasn't on the original map?

A. That's right.

Q. But on the original map prepared by you in 1939—prepared by you and your office, the three lakes and three dams and original transmission line, from Pensacola to

Markham Ferry and to the Fort Gibson site were included in that original plan?

A. Yes, sir.

Q. Was that transmission line from Pensacola to the proposed site of Markham's Ferry, and the proposed site of Fort Gibson, completed and built?

A. Yes, sir, it was completed, not to the Fort Gibson [fol. 94] dam, but to a point right opposite the Fort Gibson dam.

Q. To an available point?

A. Three or four miles west of the dam site.

Q. As an engineer, and in your professional capacity, please tell the Commissioner whether the transmission line would have been so constructed had not the Authority and you as its Chief Engineer had in mind the construction of the Fort Gibson Reservoir?

Mr. Pittle: I object, without a showing first that Fort Gibson and Markham Ferry could have been constructed by Grand River Dam Authority—the hypothetical question I think is objectionable.

Mr. Smith: I believe it is competent, he as an engineer——

The Commissioner: Let's put our ground around the other way, and I will permit you to ask him why he advised the Authority, if he did, to construct the transmission lines down river.

Mr. Smith: Thank you.

Q. (By Mr. Smith) Did you advise the Authority, Mr. Holway, to construct the additional trunk transmission line down the river, having access to the Markham Ferry site and the Fort Gibson site?

A. Yes, sir, positively.

Q. Will you please tell the Commissioner why you [fol. 95] recommended it?

A. It was a major high tension transmission line to serve as a bus, serving those three generating appliances.

Q. By "the three" what are they, in the record?

A. Pensacola, Markham Ferry, and Fort Gibson.

Q. Did you make engineering studies to determine the feasibility of an inter-connected series of dams and hydro-electric projects on Grand River at the time you were requested by the Board?

A. Yes, sir.

Q. What was your determination and finding as a professional engineer and a hydraulic engineer from your investigations and studies?

A. We found that those two dams were going to cost around $5,000,000 apiece, four and a half in one case and five and a half in the other, and advised the Authority to have the Legislature amend the Act so that they could have financing enough to build those two dams, together with the Pensacola project.

Q. And the "two dams" you are referring to are Markham's Ferry and Fort Gibson?

A. Yes, sir.

Q. And you are referring as to the costs at that time?

A. Yes, sir.

Q. Of course the record will be supplemented, but did [fol. 96] the Legislature amend your Act in accordance with your request?

Mr. Pittle: Well, the statutes will show that, if the Court please; this witness' statement is inadmissible.

Mr. Smith: It is already in an exhibit here, if the Court please.

The Commissioner: Well, whatever the facts show with respect to the amendment of the Act——

Mr. Smith: I am just trying to connect it for the benefit of the Court, in hearing the evidence, but it is in the Act, and it is in an exhibit here.

The Commissioner: All right.

Q. (By Mr. Smith) Mr. Holway, is the operation of Pensacola and Markham's Ferry when built, as economically feasible as would have been the operation by the Grand River Dam Authority of Markham's Ferry, Pensacola and Fort Gibson?

Mr. Pittle: I object, if the Court please; there is no showing as yet and I don't believe there can be that Grand River Dam Authority was given an exclusive right to generate power in that area involved. Without a showing as to that as a foundation, this witness' testimony as to the feasibility, or the economic feasibility, is irrelevant.

The Commissioner: I will overule the objection and permit the witness to express his opinion on the matter.

A. No, sir, the operation is not as economical without [fol. 97] all three dams.

Q. (By Mr. Smith) Just take a moment to explain the technical reason for that, Mr. Holway.

A. Well, because the same water that is stored at Pensacola is used over again at Markham Ferry, and over again at Fort Gibson, so there is no storage that has to be provided in the two lower dams. If you will add a percentage—fifty per cent of Pensacola power at Fort Gibson dam, with the same general overhead for your administration, and with your same technical staff, mechanics, and chief mechanics, and chief electricians, you are producing more of the commodity that you are selling with a less investment and less operating costs, if you have all three than if you had just two.

Q. May I, please, ask you whether all three units operating under a single control could maintain a higher power pool level, and achieve the same or a better flood control effect than operating separately and apart, by the Government, part by the Government and part by the Grand River Dam Authority?

Mr. Pittle: I object—that question is entirely too general, doesn't take cognizance of what the flood control requirements or orders might be in such a situation.

The Commissioner: It is also leading.

Mr. Smith: It was leading, Your Honor, but I would like to point out to the Court the purpose of my interrogation [fol. 98] if I may.

The Commissioner: Yes.

Mr. Smith: This Fort Gibson site is practically at the mouth of the Grand River, and Markham's Ferry site is some seventeen or eighteen miles up stream. When Pensacola was first built it took approximately thirty-six hours—I propose to show it by this witness—for flood waters released to go down into the Arkansas, so that a larger flood storage had to be maintained in order to prevent the meeting of flood waters on the Grand and the immersion of flood waters down the Arkansas from the other direction, but the closer the dams get to the Arkansas, less flood storage would be needed, and the more power pool operation could be had for electricity and energy, with the same efficiency in flood control. And I propose to show by this witness

that had the Grand River Dam Authority been permitted to build the three dams and operate the hydroelectric facilities of all three that the Army Engineers would have made less requirement in keeping with good science, for flood control space in each of the reservoirs and that the State could have had more electric energy output from each of the facilities.

The Commissioner: Well, I will let the witness express his opinion on the effect of centralizing control over three dams in relation to power generation, flood control, or any other pertinent operations.

Mr. Smith: Thank you.

[fol. 99] A. There would be no question in my opinion that the operation of all three dams as one unit would be more economical. The question of flood control would depend on what the Corps of Engineers would work out with the Authority; it would have to be worked out with them, and can be, I think, after Markham Ferry is built.

Q. (By Mr. Smith) Well, the specific question I was asking, Mr. Holway, was this: Do you have an opinion as to whether or not the power pool levels could be increased in Markham Ferry and Pensacola and still maintain the same degree of efficiency for flood control purposes if all three of them were operated as a unit, and by the Grand River Dam Authority, with control only for the flood control features by the Army Engineers.

A. It is my judgment—

Mr. Pittle: I want to renew my objection; I submit that the witness has answered the question and stated that it would be subject to the requirements on flood control about which he didn't know and could not know.

The Commissioner: If you want to amplify your answer in any way, you may.

A. It is my opinion that the power pool of Pensacola and Markham Ferry could be maintained at a higher level except in flood months, and could be dumped ahead of time, and I believe they have been talking to the Corps of Engineers about that for the future.

[fol. 100] Q. (By Mr. Smith) But, with separate management and control and ownership of the projects, it is not possible to work that out?

A. I think the flood control angle can be worked out, but not the efficiency of the three units operating as power units.

Q. Mr. Holway, after you were originally requested in 1937 to make a study of this matter, did the Board of Directors of the Grand River Dam Authority thereafter by official action which was shown by the minutes introduced here in an exhibit employ you to make further studies looking to the building of Fort Gibson and Markham Ferry?

Mr. Pittle: I object now, if the Court please; the Board of Directors' minutes will show what Mr. Holway was employed for, and you don't need his testimony as to that fact.

The Commissioner: Well, it would be harmless; I assume it would be duplicating evidence already in the record. Go ahead.

A. They employed us in the summer of 1940 by action of the Board to prepare plans and specifications on the two dams.

Q. And pursuant to that employment did you prepare the plans and specification?

A. We prepared preliminary plans and specifications and submitted them to the Government agencies at the time.

[fol. 101] Q. That included Markham Ferry and Fort Gibson?

A. Yes, sir.

Q. Then as I understand your testimony briefly from the inception it has been a part of the general plan?

Mr. Pittle: I object to a summary by counsel.

The Commissioner: Well, that does seem objectionable.

Mr. Smith: Thank you.

The Commissioner: The record will show the testimony of the witness.

Q. (By Mr. Smith) Have you attended all the Board meetings of the Grand River Dam Authority, Mr. Holway, since its inception?

A. All except on one or two occasions when I was out of the State.

Q. And on those occasions have you received minutes of the meetings?

A. Yes, sir, in every case.

Q. And you have a complete set of minutes of the meetings from the inception, to date?

A. Yes, sir, I have.

Q. Coupled with your personal knowledge, from having attended all meetings save one or two, when you were gone?

A. Yes, sir.

Q. Has the Grand River Dam Authority through its Board of Directors ever abandoned or discarded the idea [fol. 102] of building Markham's Ferry and Fort Gibson, until the Government came in and built the Fort Gibson dam?

A. No, sir.

Q. That was constantly a part of the plan and the program?

A. Yes, sir.

Q. How many municipalities get water out of the Grand Lake, Mr. Holway?

A. Two from the lake itself.

Q. How many from the river below?

A. Two.

Q. Were all of those municipalities obtaining their water supply from the river—from the Grand River before the creation of the Grand River Dam Authority?

A. No, sir, the town of Grove got their supply from another—from springs.

Q. And with the exception of the town of Grove, the other municipalities had obtained their supply from the lake—from the waters of the lake?

A. That's right.

Q. From your having attended all meetings of the Board of Directors of the Grand River Dam Authority save a very few and having become possessed of copies of the minutes of those that you did not attend, will you please tell the Commissioner whether or not the Board of Directors of the [fol. 103] Authority has ever granted the United States any right to use the water of Grand River.

Mr. Pittle: I object now to this—we admit and concede that we have not acquired from Grand River Dam any authority or any right, and this witness' testimony as to that would be immaterial.

The Commissioner: You may answer the question.

A. No, sir, they never have.

Q. (By Mr. Smith) Then, if the Grand River Dam Authority owned it all at one time they still own it?

Mr. Pittle: I object.

The Commissioner: I sustain that objection.

Mr. Boydstun: I would like to ask Mr. Holway one question, if the Court please.

The Commissioner: Is that agreeable, Mr. Pittle?

Mr. Pittle: I have no objection.

The Commissioner: All right.

Q. (By Mr. Boydstun) Mr. Holway, prior to August 18, 1941, had the Authority abandoned any of its comprehensive plans for the construction of the three dams on Grand River?

A. No, sir, they had not.

Q. The comprehensive plan that you testified about that you made in 1938, '39 and '40, was still the plan of the Authority in August 1941?

A. Yes, sir, it was.

[fol. 104] The Commissioner: I assume plaintiff would like to re-offer its Exhibit No. 9 for identification; am I correct about that?

Mr. Boydstun: That was the map?

The Commissioner: Yes:

Mr. Smith: I would re-offer it, Q. B., with the modification made by Mr. Holway in his evidence.

Mr. Boydstun: At this time, if the Court please, we would like to withdraw our Exhibit 9 that was offered this morning and in lieu thereof offer as amended Exhibit 9 the map so marked as Plaintiff's Exhibit amended, Exhibit 9.

Mr. Pittle: May I ask, if you change—does this map which is now Plaintiff's Amended Exhibit 9, differ physically from the map which was Plaintiff's Exhibit 9?

Mr. Boydstun: No, no, it doesn't, Mr. Pittle; as I stated this morning when we were discussing this exhibit, the purpose of offering it was to show the general comprehensive plan for the development of the three reservoirs on Grand River. The amended exhibit 9—

The Commissioner: Well, by amended exhibit 9 you merely mean the explanation offered by the witness with respect to changes made in this document after 1939?

Mr. Smith: Yes.

Mr. Boydstun: Yes.

The Commissioner: Is that right?

[fol. 105] Mr. Boydstun: That is what I am trying to say. We simply re-offer it with the modifications that have been made by the oral testimony of Mr. Holway.

The Commissioner: All right, Mr. Pittle, what is your position now?

Mr. Pittle: Subject to the qualifications of the witness' testimony we have no objection.

The Commissioner: All right then we will admit in evidence at this time the map that was previously marked for identification as Plaintiff's Exhibit 9. Of course the exhibit is admitted as Plaintiff's Exhibit No. 9 and in connection with it the Court will bear in mind the modifying just furnished by the witness in his testimony.

Now, Mr. Pittle, are you ready to cross-examine the witness?

Mr. Pittle: I just have a couple of questions.

Cross-examination.

By Mr. Pittle:

Q. Mr. Holway, you mentioned drawing preliminary plans for Grand River Dam Authority in connection with Markham Ferry and Fort Gibson; when did you submit the preliminary plans to GRDA?

A. In 1940.

Q. You furnished them to the Authority in 1940?

A. Yes, we filed them—the preliminary plans.

[fol. 106] Q. Yes, sir. Now when were you employed or when did you become engaged in drawing up those preliminary plans?

A. In 1938 we started to work on them.

Q. As to Fort Gibson and Markham Ferry?

A. Yes, in 1938.

Q. As distinguished from those in Pensacola?

A. Yes,—yes, indeed; those were contract drawings and these were preliminary plans.

Q. All right, sir. Now I would like if I may to ask a question or two regarding the opinion you expressed as to the operation of the three dams as a unit or by a single unit,

as compared with operation by separate units. Did I understand you correctly to say that if the dam at Pensacola and a dam at Markham Ferry and Fort Gibson were operated by one single agency it would be, I believe you said, physically easier?

A. I said it would be more economical.

Q. More economical, physically more economical. And you did say something about how it would affect the operation of the river for flood control did you not?

A. Well, I said it would depend on the arrangement with the Corps of Engineers has to how the flood control was operated, because they have jurisdiction, and this Authority does not.

Mr. Pittle: I have no further questions.

[fol. 107] The Commissioner: Do you have anything further?

Mr. Boydstun: Nothing further.

The Commissioner: Thank you, Mr. Holway; and you are excused.

Now, I infer from the statement made during the recess that Mr. Holway wishes to be excused permanently, is that correct?

Mr. Boydstun: Mr. Smith.

The Commissioner: Oh, Mr. Smith.

Mr. Smith: I would like leave of the Court to be excused; I have another trial engagement tomorrow.

The Commissioner: Very well.

Does plaintiff have anything further?

Mr. Boydstun: Nothing further at this time, if the Court please; we close as far as this part of it is concerned.

The Commissioner: All right, we will now adjourn until 10 o'clock tomorrow morning at which time we will hear witnesses for the defendant.

(The adjournment was taken; and the hearing resumed at 10 o'clock A.M., January 14, 1958, and the following proceedings were had:)

The Commissioner: The Court will come to order: I believe that the plaintiff closed out its case in chief at the conclusion of our session yesterday. We have now come to the point where we will hear the defendant's witnesses.

[fol. 108] Mr. Pittle: May we go off the record, please.

The Commissioner: Yes.

(Thereupon discussion was had off the record and thereafter the following proceedings were had to-wit:)

Mr. Pittle: If the Court please, the first witness I propose to call is Mr. Myron DeGeer, Assistant Chief of the Engineering Division of the Corps of Engineers of Tulsa District, to qualify two documents, Defendant's Exhibits 10 and 11, for identification. Defendant's Exhibit 10 is the project report on Fort Gibson Dam and Reservoir and Defendant's Exhibit 11 is the statement of pertinent data in connection with the actual construction of the dam. During the conference after Court with Mr. Boydstun I believe the plaintiff has agreed to withdraw its objections to the accuracy or correctness of the project data, and the pertinent data report; is that correct?

Mr. Boydstun: That is correct; we admit the authenticity of both exhibits and have no objections to the introduction of those exhibits in evidence other than we object for the reason that we think they are incompetent, irrelevant and immaterial to the issues of this case.

The Commissioner: You no longer question the accuracy of the statements of fact contained in these documents?

Mr. Boydstun: No, sir,—that is correct.

The Commissioner: I will overrule the objection then [fol. 109] and admit in evidence the documents that were previously marked for identification as Defendant's Exhibits 10 and 11.

Mr. Pittle: I am going to call Mr. Coldwell.

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[fol. 110] TESTIMONY FOR DEFENDANT

ALBERT E. COLDWELL, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

The Commissioner: You may give the reporter your name and address, please.

A. Albert E. Coldwell, 1331 South College Avenue, Tulsa, Oklahoma.

The Commissioner: All right, Mr. Pittle, you may examine the witness.

Direct Examination.

By Mr. Pittle:

Q. What is your occupation or profession, Mr. Coldwell?
A. Supervising hydraulic engineer.
Q. How long have you been a hydraulic engineer?
A. Since 1941—September 1941.
Q. Where are you presently employed, sir?
A. Corps of Engineers, Department of the Army.
Q. And how long have you occupied that position or worked for the Corps of Engineers?
A. Well, that—I have dealt exclusively with hydraulics since 1941.
Q. For the Corps?
A. For the Corps of Engineers.
Q. And for whom did you work before 1941?
[fol. 111] A. I worked for the Soil Conservation Service, Department of Agriculture, as an agriculture engineer.
Q. Will you give us a brief statement of your educational background, mentioning your college, and any degrees you might have.
A. I have a Bachelor of Science Degree in electrical engineering from New Mexico State College; and I am an associate member of the American Society of Civil Engineers and a member of the American Geophysical Union.
Q. You mentioned your degree as a Bachelor of Science in Electrical Engineering?
A. Yes, sir.
Q. Will you give us a very brief description of what that subject includes generally?
A. Well, that subject includes all phases of design and construction of electrical engineering works, and it would include mathematics in connection with electrical engineering and also the construction of steam plants and hydroelectric plants.
Q. Does it include the study of dams and reservoirs, hydroelectric dams and reservoirs?
A. One branch of electrical engineering deals with that subject.

Q. And are you versed in that branch, sir?

A. Yes, I am.

[fol. 112] Q. In connection with your duties, your position with the Corps of Engineers, are you familiar and will you give us a very brief statement of what those duties are?

A. My work with the Corps of Engineers now deals mainly with the hydraulic design and investigations of multiple-purpose projects of river basins, and my work deals with the hydroelectric power in water resources, and sedimentation work.

Q. How long have you been engaged in that phase of the work for the Corps of Engineers approximately?

A. This particular phase of it, about six years.

Q. Have you had occasion to become familiar with the Pensacola Dam and Reservoir on the Grand River in Oklahoma?

A. Yes, quite familiar.

Q. In connection with your work, sir?

A. Yes, sir.

Q. Would you explain briefly generally the circumstances under which you became familiar with that project?

A. Well, in connection with routing the stream flows of the Grand River through Fort Gibson Reservoir, it was necessary to have some idea of the amount of water flowing into and out of both Markham Ferry Reservoir and Pensacola Reservoir in order to obtain the regulated inflow into Fort Gibson reservoir.

Q. Fort Gibson being operated by the Corps of Engineers?

A. Yes, sir.

[fol. 113] Q. Did you make these studies to determine these facts?

A. Yes, I did.

Q. All right now, I show you Defendant's Exhibit 14, for identification, Mr. Coldwell, and call your attention to the first document in the group, which is a letter—or a copy of a letter dated March 17, 1953,—I am sorry, it is a copy of a memorandum dated March 17, 1953, to the Division Engineer, from the Assistant Chief of Civil Works for Power, Department of the Army. Have you ever seen the document before?

A. Yes, I have.

Q. Will you tell us in what connection, sir?

A. In connection with instructions from higher authority in order to study the request that was give in this document.

Q. Do I understand "this document" being the memorandum of March 17, 1953, Defendant's Exhibit 14, is the direction to make the study that you spoke of a moment ago?

A. Yes.

Q. Now I will ask you to examine the remaining endorsements and tell us if you can identify these various—the chain of correspondence, and memoranda—take a few moments to make sure that you know you are familiar with them.

A. Yes, I am familiar with the entire chain of correspondence.

Q. Did you participate in drafting any of the documents included in Defendant's Exhibit 14 for identification?

A. Yes, sir, I did.

[fol. 114] Q. Will you tell us briefly in what connection, sir—what did you do?

A. Well, in accordance with instructions in the basic communication, as it came down through channels to my office, I started the study in 1953 and prepared memoranda—prepared or participated in memoranda or endorsements from the Tulsa District to higher authority, and since there are several endorsements in this chain, each time the correspondence reached the Tulsa District I participated in preparation of the reply thereto.

Q. These are the documents invited in Defendant's Exhibit 14 for identification that you are referring to.

A. Yes.

Q. Now I ask you to look at the power operation rule curves and graphs showing pool elevations—or hydrographs, rather, and several power charts or power graphs, and ask if you can identify those?

A. Yes, I can identify them all.

Q. Will you please tell us whether you have seen them before or did you prepare them or what did you do, sir?

A. The actual drafting on these was done by people under my supervision.

Q. The graphs all bear initials of people under your supervision?

A. Yes, they are.

[fol. 115] Q. Where was the basic information obtained which is portrayed on these graphs?

A. It was obtained by routings that were made by these personnel.

Q. Under your supervision also?

A. Yes.

Mr. Pittle: I offer in evidence Defendant's Exhibit 14 for identification.

Mr. Boydstun: If the Court please, may I ask Mr. Coldwell a question or two?

The Commissioner: Certainly.

Mr. Boydstun: Mr. Coldwell, what was the purpose of the study that is reflected in Defendant's Exhibit 14?

A. It was to determine the effect of Pensacola Reservoir on Fort Gibson power project—especially—in order to prepare a rule curve for operation, of Fort Gibson Reseron the Grand River.

Mr. Boydstun: Does that exhibit reflect that one of the purposes for which the study was made was to work out a cooperating agreement with the Grand River Dam Authority?

Mr. Pittle: Now just a moment; I have no objection to that question on cross-examination but I gather counsel is now questioning on voir dire as to the admissibility of these documents, and I think he is entering into a different area of examination.

[fol. 116] The Commissioner: Yes, we are now trying to find out whether this document qualifies for admission.

Mr. Boydstun: Yes, for the purpose of, maybe, an objection if the Court please, and I wouldn't mind stating it. It is my recollection that one of the purposes of this study was to enter into a coordinating agreement with the GRDA, to coordinate Pensacola with the Fort Gibson operation and that the Authority has never been contacted—it is not a party to any of this inter-office arrangement.

Mr. Pittle: May I respond to that, sir?

The Commissioner: Yes.

Mr. Pittle: I believe the correspondence included in De-

fendant's Exhibit 14 will show just exactly what Mr. Boydstun is referring to.

The Commissioner: Uh huh. Well, you may answer the question, but let's not pursue this phase of it too far.

Mr. Boydstun: That's the only question I have is, if that was one of the purposes of exhibit 14.

A. Well, I think the documents are self-evident, that that was one of the purposes.

Mr. Boydstun: If the Court please, we admit the authenticity of Plaintiff's Exhibit 14 and the correctness of the contents thereof but we object to the admission of it for the reason it is incompetent, irrelevant and immaterial and does not tend to prove or disprove any of the issues in this [fol. 117] case; it is more or less self-serving.

The Commissioner: Well, I will overrule that objection and admit in evidence as Defendant's Exhibit 14, the document that we have previously marked for identification under that number.

Q. (By Mr. Pittle) Mr. Coldwell, I now show you Defendant's Exhibits 15-A through 15-F, inclusive, and ask if you will examine these documents and tell the Court whether you can identify any of them—in that connection I call your attention to the name, A. E. Coldwell, typed on Defendant's Exhibit 15-E.

A. I have seen all these communications and helped prepare and participate in the correspondence concerned.

Q. Was this correspondence a result of the studies that you discussed a moment ago?

A. It was very similar to the other studies, as a result of a basic communication originating in the office, Chief of Engineers, giving certain instructions to the field.

Q. And you, being in the field, what was your function in handling or participating in the prepafation of these memoranda?

A. To make the required studies and give answers to higher authority.

Q. Are these the results of your studies and the answers that you prepared or participated in, sir?

[fol. 118] Yes.

Mr. Pittle: I offer in evidence Defendant's Exhibits 15-A through 15-F.

Mr. Boydstun: We admit the authenticity and the correctness of the exhibits but object for the reason they are incompetent, irrelevant and immaterial and self-serving.

The Commissioner: The objection is overruled and these several documents are admitted in evidence as Defendant's Exhibits 15-A through 15-F.

Mr. Pittle: I have no further questions.

The Commissioner: Do you have any further question?

Mr. Boydstun: No further questions.

The Commissioner: You are excused, Mr. Coldwell.

Mr. Coldwell: Thank you.

Mr. Pittle: If the Court please, there were several other documents which the defendant offered in evidence; they are in the record for identification but I will not attempt to qualify them further for admission. And that completes our phase of the case at this time. I would like to request the Court to take judicial notice in addition of the Oklahoma statutes which Mr. Smith—your associate?

Mr. Boydstun: Yes.

Mr. Pittle: Mentioned yesterday, and all of the Federal Legislation relating to flood control, this project in par-
[fol. 119] ticular, and of course a number of Federal and State decisions. The Federal decisions being matters of law I suppose will be the subject of our briefs—for discussion in our briefs.

The Commissioner: Well, of course the Court of Claims will take judicial notice of all pertinent statutory material both State and Federal. As I mentioned yesterday when Mr. Smith raised the point, it would be helpful to the Court for each side to furnish not only accurate references to statutory material but perhaps copies of any portions that you regard as especially significant with reference to this particular litigation.

Mr. Pittle: Making a distinction between judicial notice and judicial knowledge? Yes, we will be glad to do that.

Mr. Boydstun: We concur in Mr. Pittle's suggestion, Your Honor.

The Commissioner: Thank you. Now does the plaintiff have anything to offer in rebuttal?

Mr. Boydstun: I believe that's all if the Court please on this phase of it.

The Commissioner: Apparently then the trial of the case of the Grand River Dam Authority against the United States has been concluded.

Before we adjourn I would like to thank counsel on both [fol. 120] sides for the pleasant, as well as the competent manner in which the case has been presented.

We will now stand adjourned, gentlemen.

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[fol. 121] Reporter's Certificate to foregoing transcript omitted in printing.

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[fol. 122] IN THE UNITED STATES COURT OF CLAIMS

PLAINTIFF'S EX. 1

Case No. 226-56

IN THE DISTRICT COURT OF MAYES COUNTY, OKLAHOMA

No. 5263

CITY OF TULSA, a Municipal Corporation, Plaintiff,

vs.

GRAND-HYDRO, a Corporation, et al., Defendants

DECREE

Now on this 10th day of February, 1938, the above styled cause came on regularly for hearing. The plaintiff appeared by its city attorney H. O. Bland, and by special counsel Harve M. Langley; the defendant Grand-Hydro, a corporation, appeared by its president and attorney of record W. E. Hudson; the City of Muskogee, a municipal corporation, appeared through its attorney William Rampendahl; the City of Wagoner, a municipal corporation, appeared by its attorney W. O. Rittenhouse; the City of Pryor Creek, a municipal corporation, appeared by its attorney Ernest R. Brown; the Town of Fort Gibson, a municipal corporation, appeared by its attorney Q. B. Boydston; the Oklahoma Hydro-Electric Company, a corporation,

appeared by its attorney Wilbur J. Holleman; the defendant T. C. Bowling appeared in person; Cedar Crest Lakes Company, an Oklahoma express trust, appeared by its attorney Maurice F. Ellison; the defendant Grand River Dam Authority appeared by its general counsel R. L. Davidson and its associate counsel Jack L. Rorschach; the State of Oklahoma and the Oklahoma Planning and Resources Board appeared through Randell S. Cobb, Assistant Attorney General of the State of Oklahoma; the City of Vinita, a municipal corporation, appeared by its attorney W. T. Rye; the City of Miami was not represented by attorney, it having filed an answer that it did not now nor has at any time past used any of the waters belonging to the Grand River [fol. 123] or any of its tributaries. All of the parties present announced ready for trial except the defendant Oklahoma Hydro Electric Company, which asked for a postponement of the trial. The request was withdrawn under an agreement made in open court that after the other parties desiring to introduce evidence had closed their testimony, the Oklahoma Hydro Electric Company should have the privilege if it so desired at that time, of delaying the trial two days, for the purpose of amending its answer and introducing its evidence. Thereupon, the city of Tulsa introduced its evidence, after which the defendants the city of Muskogee, the city of Wagoner, the city of Pryor Creek, the town of Fort Gibson, the Grand-Hydro, Cedar Crest Lakes Company and T. C. Bowling and Grand River Dam Authority introduced their evidence. The introduction of evidence by all parties other than the Oklahoma Hydro-Electric Company having been concluded, the Oklahoma Hydro-Electric Company claimed its right under the agreement made in open court, to a delay of the trial for two days, which claim the court indicated would be allowed, but it was agreed in open court that further hearing of the cause would be continued until February 12, 1938, at 9:00 o'clock A.M., at which time the hearing of the cause would be resumed unless the Oklahoma Hydro-Electric Company at that time was not ready to proceed, in which event, the further hearing was to be further continued until February 14, 1938. Prior to convening of the court on February 12, 1938, the Oklahoma Hydro-Electric Company advised the court that it would not be ready to resume the

hearing of the cause on February 12th, but would be ready to resume the same on February 14th. Upon convening of the court on February 12th further hearing of the cause was continued by the court until 5:00 o'clock P.M. February 14, 1938. Further hearing of the cause was resumed at 5:00 o'clock P.M. on February 14, 1938, and the Oklahoma Hydro-Electric Company introduced its evidence and the Grand River Dam Authority and the Grand-Hydro introduced their rebuttal evidence.

Thereupon, the court having heard all the evidence and the argument of counsel, and being fully advised in the premises, finds and adjudges:

[fol. 124] 1. That Spavinaw Creek is a separate and distinct stream system from that of Grand River, although it is a tributary of Grand River; that the average flow of Spavinaw Creek is 450 cubic feet per second; that the City of Tulsa has actually appropriated to a beneficial use for municipal purposes, 45 cubic feet per second of the flow of said creek; that there is now unappropriated in the flow of said creek 405 cubic feet per second; that the City of Tulsa is diverting from the flow of said creek approximately 45 cubic feet per second, and conveying the same through a conduit to the City of Tulsa for municipal purposes; that the point of diversion is at the Town of Spavinaw, where the City of Tulsa constructed a dam impounding approximately 31,000 acre feet of water, and that the diversion of said water actually began in April 1924, which diversion has been continuous ever since; that on May 11, 1922, the City of Tulsa filed its application with the State Engineer of the State of Oklahoma for a permit to appropriate the minimum flow of said creek (45 cubic feet per second) to a beneficial use, to-wit: a municipal water supply, and on the 5th day of August, 1922, the City of Tulsa filed its amended application with the State Engineer of the State of Olakhoma for a permit to appropriate the minimum flow of said creek for the same purpose; that the State Engineer fixed a day certain for the hearing of said application and amended application, and directed notice of said hearing to be given as provided by law; that due notice of said hearing was given, and on the 28th day of November, 1922, the State Engineer issued a permit to the City of Tulsa and approved its applications for the

appropriation of the entire flow of said creek for municipal purposes; that thereafter the City of Tulsa, on March 23, 1932, filed with the Conservation Commission of Oklahoma an amendment to its applications seeking to appropriate the excess flow of Spavinaw Creek over and above the 45 cubic feet per second already applied for, to meet future needs of the City of Tulsa for water works purposes; that no person, firm or corporation other than the City of Tulsa [fol. 125] has ever applied for the right to appropriate the waters of Spavinaw Creek to a beneficial use, or actually applied the waters of said creek to a beneficial use; that the City of Tulsa has been diligent in the construction of its water works system necessary to use the waters of Spavinaw Creek for municipal purposes and has been diligent in the appropriation of said waters for municipal purposes and has been diligent in the prosecution of its application for a prmit to appropriate said waters for said purpose, and is prior in point of time to other persons, firms and corporations in making application to the proper authorities for such permit.

2. That on the 14th day of July, 1931, the defendant Grand-Hydro, a domestic corporation, filed with the Conservation Commission of Oklahoma its application in due form for a permit to appropriate 4,000 cubic feet per second of the flow of Grand River for the purpose of generating electric energy and power; that the Commission fixed a day certain for the hearing of said application and directed that notice of said hearing be given as provided by law; that said notice was duly given, and on the 29th day of August, 1931, the said Commission issued to the Grand-Hydro a permit to appropriate to a beneficial use (the generation of electric energy and power) 4,000 cubic feet per second of the flow of grand River; that under the authority of said approved application, Grand-Hydro proceeded with diligence to acquire one or more dam sites for the purpose of constructing a dam to impound the waters of Grand River for use in the generation of electric power and energy, and in making extensive engineering investigations and surveys, and in the aquisition of lands in the basin area of the reservoir which would be inundated by the impounded waters, but the court finds and adjudges that the Grand-Hydro did not construct any works or fa-

cilities through which to utilize the waters of said river for the purpose of generating electric energy or for any other beneficial use, and did not actually apply and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to apply or appropriate any of the waters of [fol. 126] said river to any beneficial use, but that if Grand-Hydro acquired any rights under its said approved application, it has transferred and conveyed the same to the Grand River Dam Authority by virtue of its assignment of January 10, 1938.

3. The court further finds and adjudges that on the 20th day of February, 1932, the City of Pryor Creek filed its application with the Conservation Commission of Oklahoma for a permit to appropriate .375 cubic feet per second of the flow of Grand River to meet its present need for municipal water works purposes and .75 cubic feet per second of the flow of said river for its future needs; that the Commission fixed a day certain for the hearing of said application, and directed that notice thereof be given as provide by law; that such notice was duly given, an on the 14th day of April, 1932, the said Commission issued to the City of Pryor Creek its permit to appropriate for municipal purposes .375 cubic feet per second of the flow of said river for its present municipal needs and .75 cubic feet per second of the flow of said river for its future municipal needs; that the City of Pryor Creek constructed its water works system and began taking its water supply from Grand River in 1910, and has used the waters of Grand River for that purpose continuously ever since; that the point of diversion is near the northwest corner of Section 12, Township 20 North, Range 19 East, in Mayes County, Oklahoma.

4. The court further finds and adjudges that on the 29th day of February, 1932, the City of Muskogee filed its application with the Conservation Commission for a permit to appropriate 30 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application and directed that notice thereof be given as provided by law; that such notice was duly given, and on the 4th day of April, 1932, the said Commission issued to the City of Muskogee a permit to appropriate 30 cubic feet per

second of the flow of said river for municipal purposes; that the City of Muskogee began using the water of Grand River for municipal purposes prior to statehood and at statehood was using said waters at the rate of 5 cu. ft. per second and has continuously used the same for such purposes ever since and is now using the waters of said river for such purpose to the extent of 25 cubic feet per [fol. 127] second; that the point of diversion by the City of Muskogee is approximately 1300 feet above the confluence of Grand River with the Arkansas River; that the water works system of the City of Muskogee was constructed and operated prior to statehood and has been operated in its present condition since 1913.

5. The court further finds and adjudges that on March 3, 1932 the City of Vinita filed its application with the Conservation Commission for a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application, and directed that notice be given thereof as provided by law; that such notice was duly given and on the 8th day of April, 1932, said Commission issued to the City of Vinita a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the said city constructed its water works system and began the diversion of 5 cubic feet per second of the flow of said river for municipal purposes in 1922, at a point on said river in Section 2, Township 23 North, Range 21 East, in Mayes County, Oklahoma, and has ever since continously used the waters of said river for municipal purposes to that extent.

6. The court further finds and adjudges that on the 9th day of March, 1932, the City of Wagoner filed its application with the Conservation Commission for a permit to appropriate 4 cubic feet per second of the flow of Grand River for municipal purposes; that the said Commission fixed a day certain for the hearing of said application, and caused notice of said hearing to be given as provided by law, and on the 14th day of April 1932 said Commission issued to the City of Wagoner a permit to appropriate four cubic feet per second of the flow of Grand River for municipal purposes; that the said city began using the waters of said river for municipal purposes prior to statehood, and at the time of

statehood was using said waters at the rate of 2 cubic feet per second, and has since continuously used the waters of said river for such purposes and is now using 2 cubic feet per second for present needs, and has asked in its application for an additional 2 cubic feet per second for its future needs; that the diversion of said waters from said river by the City of Wagoner began in 1903 and has been contin- [fol. 128] uous ever since; that the point of diversion is located 534 feet north and 890 feet east of the southwest corner of the Northwest quarter (NW ¼) of Section 20, Township 18 North, Range 19 East of the Indian Base and Meridian, in Wagoner County, Oklahoma.

7. The court finds and adjudges that on the 24th day of March, 1932, Cedar Crest Lakes Company, an Oklahoma express trust, filed its application with the Conservation Commission for a permit to appropriate 500 acre feet of the flow of Spring Creek, a tributary of the Grand River in Mayes County, for the purpose of recreation and fish culture; that the said commission fixed a day certain for the hearing of said application, and caused notice thereof to be given as provided by law, but that no permit was ever issued to Cedar Crest Lakes Company by the Commission, nor has any further action been taken on said application; that during the year 1932 the Cedar Crest Lakes Company constructed a dam across Spring Creek inundating 110 acres of land located in Section 24, Township 19 North, Range 19 East, and Sections 18 and 19, Township 19 North, Range 20 East, in Mayes County, Oklahoma, and has continuously maintained said dam to this date, and devoted the water thus impounded to recreation and fish culture.

8. The court finds and adjudges that long before statehood the Town of Fort Gibson began using the waters of Grand River for municipal purposes, and on the advent of statehood was using 1.543 cubic feet per second of the flow of said river for such purposes, and is now and has been continuously since statehood, using 1.543 cubic feet per second of the flow of said river for such purposes, but has never filed any application with the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, for a permit to appropriate any of the waters of said river for municipal or other beneficial use; that

the point of diversion is located in Section 2, Township 15 North, Range 19 East, in Muskogee County, Oklahoma.

9. The court further finds and adjudges that on June 19, 1922, the Grand River Hydro Electric Company, a corporation, filed its application with the State Engineer for a permit to appropriate the entire flow of Grand River at a point [fol. 129] located 1154 feet north and 87 feet west of the southeast corner of Section 15, Township 23 North, Range 21 East, in Mayes County, Oklahoma, Dam No. 1 for the purpose of generating electric energy and power; that the State Engineer fixed a day certain for the hearing of said application, and directed that notice thereof be given as provided by law; that such notice was duly given and on the 23rd day of September, 1922, the State Engineer endorsed on said application his approval thereof; that on June 18, 1923 the Grand River Hydro-Electric Company, a corporation, filed its applications (3) with the State Engineer to appropriate the entire flow of Grand River for the purpose of generating electric energy at three points on the river, (for dam No. 2 at a point located 2640 feet north and 1320 feet west of the southeast corner of Section 4, Township 21 North, Range 20 East, in Mayes County; for dam No. 3 at a point 2640 feet North of the southwest corner of Section 14, Township 19 North, Range 19 East, in Mayes County; and for dam No. 4 at a point located 2640 feet south and 650 feet west of the northeast corner of Section 22, Township 17 North, Range 19 East, in Cherokee and Wagoner Counties); that the State Engineer fixed a day certain for the hearing of said applications, and caused notice thereof to be given as provided by law, and on July 1, 1924, endorsed on said applications his approval therof; that the Oklahoma Hydro-Electric Company has acquired by mesne assignments and transfers, whatever rights the Grand River Hydro Electric Company ever had or possessed by virtue of filing of said applications and the State Engineer's approval thereof, but the court finds and adjudges that neither the Grand River Hydro-Electric Company nor the Oklahoma Hydro-Electric Company, nor other person, firm or corporation claiming rights under the approved applications of Grand River Hydro-Electric Company, ever constructed any works or facilities through which to use any of the waters of said river for the purpose of generating

electric energy or for any other beneficial use, or ever applied or appropriated any of the waters of said river to a beneficial use; that neither the said Grand River Hydro-[fol. 130] Electric Company nor the Oklahoma Hydro-Electric Company, nor any one claiming rights under the approved applications of the Grand River Hydro-Electric Company used due diligence in the prosecution of improvements necessary to utilize the waters of said river for a beneficial purpose, or used due diligence in the appropriation of the waters of said river to a beneficial use, or used due diligence in prosecuting said applications, or any of them, and that the Grand River Hydro-Electric Company and its assignees, including the Oklahoma Hydro-Electric Company, have abandoned the proceedings instituted by the Grand River Hydro-Electric Company to acquire the right to appropriate the waters of said river to a beneficial use; that the Grand River Hydro-Electric Company failed to pay its corporation license taxes, for which reason its charter was forfeited by the State in 1934, and it ceased to be a corporation and does not now and has not since 1934 possessed any corporate powers, but the court finds that before the forfeiture of the charter, the Grand River Hydro-Electric Company assigned and conveyed all of its rights to the persons who later transferred and assigned such rights to the Oklahoma Hydro-Electric Company, and the court finds and adjudges that the Oklahoma Hydro-Electric Company has no right to appropriate any of the waters of the Grand River to any beneficial use, and that no person, firm or corporation has any right to appropriate any of the waters of Grand River to any beneficial use under or by virtue of the approved applications of the Grand River Hydro-Electric Company; that if any rights ever existed under said approved applications, they have been abandoned and forfeited and ceased to exist prior to the enactment of Article 4, Chapter 70, of the 1935 Session Laws of the State of Oklahoma, creating the Grand River Dam Authority and appropriating to it the entire flow of the Grand River and conferring upon it the right to control, store, preserve and use the waters of said river for the beneficial purposes specified in said Act.

10. The court further finds and adjudges that the Oklahoma Hydro-Electric Company has never applied to the

[fol. 131] State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority, for any permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of said waters to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

11. The court finds and adjudges that the City of Miami has never applied to the State engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority for a permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

12. The court finds and adjudges that on September 25, 1931, the defendant T. C. Bowling filed his application with the Conservation Commission for a permit to appropriate 550 acre feet of the flood flow of Mayes Branch, a tributary of Grand River in Mayes County, Oklahoma, for the purpose of fish culture and irrigation, and on February 20, 1932, the said defendant filed with said Commission an amended application for a permit to appropriate 550 acre feet of the flow of said Mayes Branch for the same purposes; that the said Commission fixed a day certain for the hearing of said application and amended application, and caused due notice thereof to be given as provided by law; that on March 26, 1932, the said Commission issued to said defendant a permit to appropriate the said 550 acre feet of the flow of Mayes Branch for said purposes; that the said defendant on or about the 26th day of March, 1932, constructed a concrete core wall and earthen dam across said Mayes Branch and inundated about 30 acres of land, and has continuously maintained said dam to this date, devoting the waters so impounded to the culture of fish and the irrigation of shrubbery, trees and garden spot on adjacent land.

13. The court further finds and adjudges that all of said permits for the appropriation of the waters of Grand River and Spavinaw Creek were prematurely issued because no [fol. 132] hydrographic survey of the stream system of the grand River or Spavinaw Creek had ever been made

and filed as required by law, and no judicial determination by a court of competent jurisdiction of the appropriated and unappropriated waters of said Grand River or Spavinaw Creek had ever been had; that a hydrographic survey of the stream system of the Grand River was made by the Oklahoma Planning and Resources Board and filed in this cause on February 10, 1938, and that no adjudication by any court of competent jurisdiction of the appropriated and unappropriated waters of the stream system of Grand River has ever been made heretofore; that no vested rights to appropriate any of the waters of Grand River to a beneficial use have accrued to any parties to this cause except the Grand River Dam Authority since statehood; that no person, firm or corporation ever appropriated or applied the waters of Grand River or Spavinaw Creek to a beneficial use prior to statehood, other than the Town of Fort Gibson to the extent of 1.543 cubic feet per second, the City of Wagoner to the extent of 2 cubic feet per second and the City of Muskogee to the extent of 5 cubic feet per second; that said three cities have an equal right to use the waters of Grand River for municipal purposes to the extent herein adjudged, which right is prior and superior to the rights of all other parties to that extent.

14. The court further finds and adjudges that no person, firm or corporation other than the Grand River Dam Authority has acquired since statehood the right to appropriate any of the waters of Grand River to a beneficial use; that Article 4 of Chapter 70 of the 1935 Session Laws of the State of Oklahoma, which became effective on the 29th day of July, 1935, appropriated to and vested in the Grand River Dam Authority the absolute right to control, store and preserve the waters of Grand River for the purposes set forth in said Act, including the generation of electric energy, irrigation, recreation and the prevention of damage to persons and property from the flood waters of said river, and operated as an appropriation of all of the waters of Grand River to the Grand River Dam Authority for the purposes therein specified, subject only to the right of the Town of Fort Gibson to use for municipal purposes 1.543 [fol. 133] cubic feet per second of the flow of said river, the right of the City of Wagoner to use 2 cubic feet per second of the flow of said river for municipal purposes, and the

right of the City of Muskogee to use 5 cubic feet per second of the flow of said river for municipal purposes, at the points of diversion hereinbefore adjudged; that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the City of Vinita, the City of Pryor Creek, the City of Miami, T. C. Bowling, Cedar Crest Lakes Company, the Oklahoma Hydro-Electric Company, the Grand River Hydro-Electric Company, the Oklahoma Planning and Resources Board, and all other persons, firms and corporations save and except the Town of Fort Gibson, the City of Wagoner and the City of Muskogee to the extent hereinbefore adjudged, and that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the town of Fort Gibson, the City of Wagoner and the City of Muskogee to appropriate the waters of said river in excess of 1,543 cubic feet per second for the Town of Fort Gibson, 2 cubic feet per second for the City of Wagoner and 5 cubic feet per second for the City of Muskogee, and the court further finds and adjudges that the Act creating the Grand River Dam Authority is a legislative appropriation to the Grand River Dam Authority of all the waters of Grand River and its tributaries in Oklahoma, except 1.543 cubic feet per second in favor of the town of Fort Gibson, 2 cubic feet per second for the City of Wagoner and 5 cubic feet per second for the City of Muskogee, and that it is unnecessary for the Grand River Dam Authority to apply to the Oklahoma Planning and Resources Board for a permit to appropriate the waters of Grand River to a beneficial use or secure from the Oklahoma Planning and Resources Board a permit or license to appropriate said waters to a beneficial use, or to construct works or facilities for use in applying said waters to a beneficial use; that no person, firm or corporation other than those hereinbefore mentioned, has ever applied for the right to appropriate or actually appropriated the waters of said river to a beneficial use.

15. The court further finds and adjudges that the Grand River Dam Authority has declared its intention to construct and is now engaged in constructing a dam approx- [fol. 134] imately 147 feet in height, across the Grand River near the Town of Pensacola, in Mayes County, Okla-

homa; that said dam will impound at the power pool level 1,600,000 acre feet of water, and at the flood pool level 2,200,000 acre feet of water; that the Grand River Dam Authority has declared its intention and is proceeding to construct in connection with the said dam, a hydro-electric power plant with an installed capacity of 60,000 K.W., through which will pass during operation of the plant, water varying from 1,000 to 6,000 cubic feet per second, said dam to be equipped with flood gates to control the flood waters of said river and with a sluice gate 10 feet square in the lower part of the dam structure, through which the waters of the river may be discharged at any time.

16. The court further finds and adjudges that at the Pensacola dam site the average flow of the Grand River is 6300 cubic feet per second, and that at the mouth of said river the average flow of the stream is 8400 cubic feet per second; that the run-off of the water shed of the Grand River below the Pensacola dam site is more than sufficient to supply the needs of the City of Pryor Creek, the City of Wagoner, the City of Muskogee and the Town of Fort Gibson, which take their water supply from the Grand River below the Pensacola dam site, and that the construction and operation of the Grand River dam and hydro-electric power plant by the Grand River Dam Authority will maintain in the channel of the Grand River below the Pensacola dam site, a very much larger flow during dry periods than now exists; that the control of the flood waters of Grand River through operation of the flood gates of said dam, will protect the water works facilities of said cities from inundation during flood periods; that the construction and operation of said dam by the Grand River Dam Authority will substantially aid in preventing the waters of the Arkansas River from entering the intake of the Muskogee water works system; that the construction and operation of said dam and hydro-electric power plant will materially benefit the municipalities using the waters of Grand River for municipal purposes, by maintaining in said river a regulated flow of water and providing them a better quality of water for their consumption; that the City of Vinita takes its supply of water for [fol. 135] municipal purposes from the Grand River above the Pensacola dam site.

17. The court further finds and adjudges that neither the Oklahoma Hydro-Electric Company, the Grand-River Hydro-Electric Company, the Grand-Hydro, nor Clontz & Bozarth, have any rights to any of the waters of Grand River or its tributaries, and have never appropriated or applied any of the waters of said stream or its tributaries to a beneficial use.

18. The court further finds and adjudges that subject to the prior right of the Town of Fort Gibson to divert and appropriate for municipal purposes 1.543 cubic feet per second of the flow of Grand River, and of the City of Wagoner to divert and appropriate for municipal purposes 2 cubic feet per second of the flow of Grand River, and of the City of Muskogee to divert and appropriate for municipal purposes 5 cubic feet per second of the flow of Grand River, and the prior right of the Grand River Dam Authority to appropriate all of the remaining flow of the Grand River for the purposes set forth in the Act creating the Grand River Dam Authority, the priorities of the parties hereto in the matter of making application to the proper authorities for a permit to appropriate the waters of Grand River to a beneficial use since statehood, are as follows and for the following purposes and to the following extent:

(1) The City of Pryor Creek to the extent of .375 cubic feet per second for its present municipal needs, and .75 cubic feet per second for its future needs;

(2) The City of Muskogee to the extent of 30 cubic feet per second for municipal purposes;

(3) The City of Vinita to the extent of 5 cubic feet per second for municipal purposes;

(4) The City of Wagoner to the extent of 4 cubic feet per second for municipal purposes;

(5) T. C. Bowling, the waters of Mayes Branch, a tributary of Grand River, to the extent of 550 acre feet for fish culture and irrigation;

(6) Cedar Crest Lakes Company, 500 acre feet of the flow of Spring Creek, a tributary of the Grand River in Mayes County, Oklahoma, for recreation and fish culture.

[fol. 136] 19. It is further ordered and adjudged by the court that the total costs of this action are hereby taxed at $150.00, of which said sum the plaintiff of the City of Tulsa will pay $75.00, and the Grand River Dam Authority $50.00, the City of Muskogee $15.00, and the Town of Fort Gibson and City of Wagoner each $5.00.

20. The defendants Oklahoma Hydro-Electric Company, City of Muskogee, City of Wagoner, City of Pryor Creek, City of Vinita, City of Miami, Town of Fort Gibson, Cedar Crest Lakes Company and T. C. Bowling each excepts to the court's findings and decree, which exceptions are hereby allowed by the court.

Rendered in open court this 14th day of February, 1938.

N. B. Johnson, Judge.

[fol. 137] [Endorsed:] No. 5263. In the District Court of Mayes County, Oklahoma. City of Tulsa, a Municipal Corporation; Plaintiff, vs. Grand-Hydro, a Corporation, et al; Defendants. DECREE Filed in the District Court Mayes County, Oklahoma, February 10, 1938. R. A. Delozier, Court Clerk. Recorded in Civil Journal. No. 16 at Page 482-83-84-85-86-87-88-89.

[fols. 138-138a] IN THE UNITED STATES COURT OF CLAIMS

SUBMISSION OF CASE

On May 4, 1959, the case was submitted on the merits without argument by Mr. Q. B. Boydstun for the plaintiff and by Mr. Herbert Pittle for the defendant.

[fol. 139] IN THE UNITED STATES COURT OF CLAIMS

No. 226-56

GRAND RIVER DAM AUTHORITY

v.

THE UNITED STATES

Mr. Q. B. Boydstun for the plaintiff.

Mr. Herbert Pittle, with whom was Mr. Assistant Attorney General Perry W. Morton, for the defendant.

OPINION—July 15, 1959

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, the Grand River Dam Authority, is an agency of the State of Oklahoma, upon which the State of Oklahoma had conferred the right "To control, store and preserve, within the boundaries of the District, the water of Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;" and "To develop and generate water power and electric energy within the boundaries of the District."

Pursuant to the power granted to it, the Authority made a survey of the Grand River and adopted a plan which contemplated the erection of a dam at Pensacola, and one at Markham Ferry, and one at Fort Gibson. With funds supplied by the defendant, a grant of $8,500,000 and a loan of $11,500,000, it completed the erection of a dam at Pensacola in 1940. On May 12, 1939, the Legislature of Oklahoma authorized the plaintiff to issue $10,000,000 of bonds for the construction of dams at Markham Ferry and at Fort Gibson, and by 1940 it had acquired lands, easements, and rights-of-way, and had constructed transmission lines, sub-

stations and other facilities for the connection of the [fol. 140] Pensacola project with its contemplated Markham Ferry and Fort Gibson dams.

However, before anything further had been done by the plaintiff, Congress, on August 18, 1941, passed the Flood Control Act (55 Stat. 638, 645), which authorized, among other things, three dam-and-reservoir projects on the Grand River, one at Pensacola, one at Markham Ferry, and another at Fort Gibson, to be constructed by the United States. On May 22, 1946, before any construction had been begun by the plaintiff on a dam at Fort Gibson, the defendant began the construction of a dam at this site and completed it on June 15, 1950.

The Grand River is a non-navigable stream, but it is one of the tributaries of the Arkansas River, a navigable river. The Fort Gibson project was constructed by the defendant as an integral part of a comprehensive plan for the improvement and regulation of navigation, the control of floods, and the production of hydroelectric power on the Arkansas River and its tributaries.

The plaintiff sues the defendant for the taking of its property as a result of this project. It claims that the defendant must pay compensation for (1) its water power rights at the Fort Gibson unit, (2) its exclusive franchise to develop electric power and energy at the Fort Gibson unit, and (3) certain items of severance damages including storage and headwater benefits accruing to the Pensacola unit from the Fort Gibson unit; the cost and value of surveys, plans and specifications for the Fort Gibson unit; and the loss of the use and value of certain lands and rights-of-way theretofore acquired for the inter-connection of the Fort Gibson unit with the plaintiff's system and for the distribution of electric power and energy from the Fort Gibson unit.

The right of a state to control and utilize the water of a non-navigable stream within its boundaries is subordinate to the right of the United States to control such waters to the fullest extent necessary to improve or regulate navigation on a navigable river to which the non-navigable stream is a tributary. There is no question as to the power of the Federal Government to do what it has done here. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508. The question be-

[fol. 141] fore this court is whether or not it must pay just compensation for any private property it has taken in carrying out its project.

The Commerce Clause of the Federal Constitution, Article I, Section 8, gives to the United States the power to improve and regulate navigable waters without any liability for damage to private property within the bed of the navigable stream, i.e., the lands below ordinary high-water mark, and water rights in navigable streams below high-water mark are inferior to and subject to this superior navigation easement and may be taken without compensation. *United States* v. *Willow River Power Co.*, 324 U.S. 499; *United States* v. *Chicago, Milwaukee, St. Paul, and Pacific Railroad Co.*, 312 U.S. 592; *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377; *United States* v. *Chandler-Dunbar Water Power Company*, 229 U.S. 53. Where Congress has appropriated the entire flow of a navigable river for a project designed to serve the interests of navigation although other purposes are also served, the owner of fast lands above the high-water mark of the stream has no compensable property rights in the flow of the navigable river. *United States* v. *Twin City Power Company*, 350 U.S. 222.

The United States also has the power to take private property on non-navigable streams which are tributary to navigable streams, and such Government action cannot be enjoined. *Oklahoma* v. *Atkinson Co., supra.* In that case, the State of Oklahoma sought, without success, to enjoin the Federal Government from proceeding with the construction of the Denison Dam.

But if the Governmental action, under its power to regulate and improve navigable streams, results in the taking of private property located on a non-navigable stream which is a tributary of the navigable river, the United States must pay just compensation for the private property so taken. *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799; affirming 109 C. Cls. 555; *United States* v. *Cress*, 243 U.S. 316; *Iowa-Wisconsin Bridge Company* v. *United States*, 114 C. Cls. 464, cert. denied, 339 U.S. 982.

The question then becomes whether or not the plaintiff herein had property rights which have been taken by the United States. We are not faced with a situation involving

water rights in the flow of a navigable stream as in *United* [fol. 142] *States* v. *Twin City Power Company*, *supra*. The State of Oklahoma owns the waters of the Grand River, a non-navigable stream, and the State conferred on the plaintiff all the rights which is possessed in the stream. Oklahoma does not follow the common law doctrine of riparian rights but follows instead the doctrine of prior appropriation for beneficial use or the so-called "Arid States Doctrine." Under this doctrine, the water running in a natural stream is the property of the State. Oklahoma Code, Title 60, Section 60 and Title 82, Section 1, O.S. 1951; *Murphy* v. *Kerr*, 296 Fed. 536. The property taken in the *Cress* and *Kansas City Life Ins. Co.* cases, cited above, was the impairment of the value of land in and adjacent to a non-navigable stream. In the *Kelly* case, reported with the *Cress* decision, the property right which was taken and for which compensation had to be paid was the right to the natural flow-off of the water in the non-navigable stream. *Cf. Willow River Power Company*, *supra*, where the Supreme Court said there was not the same right to have the navigable St. Croix flow tail waters away at natural levels that there was in *Kelly* to have the non-navigable stream run off his tail waters at natural levels. Water rights are a property interest which if taken by the United States must be paid for. *International Paper Company* v. *United States*, 282 U.S. 399. We believe the same rule should apply to the instant case, and that the plaintiff's vested water rights on a non-navigable stream were property rights which could not be taken without just compensation.

The other items of property which the plaintiff claims have been taken by the United States include its franchise to develop and generate electric power and energy at the Fort Gibson site, and certain items of severance damage. A license of franchise is a property right for the taking of which compensation must be paid. *International Paper Company* v. *United States*, *supra*; *Frost* v. *Corporation Commission*, 278 U.S. 515; *Jackson* v. *United States*, 122 C. Cls. 197; *United States* v. *Smoot Sand & Gravel Co., Inc.*, 248 F. 2d 822. *Cf. Southern Counties Gas Co.* v. *United States*, No. 483-54, decided January 15, 1958, in which this court found that the actions of the United States

had made the franchise less valuable but did not amount to a taking of the franchise.

[fol. 143] As to the items of severance damages, we believe that these were in the nature of indirect or consequential damages and therefore not compensable. *Mitchell* v. *United States*, 267 U.S. 341; *Omnia Commercial Company* v. *United States*, 261 U.S. 502.

The Government's primary defense to this lawsuit was that the plaintiff did not have any private property rights which could be the subject of a taking by the United States. We have answered that contention above. The Government has raised certain other defenses which we have considered and have rejected. The Government's suggestion of an estoppel from certain meetings, letters, etc., seems to us to have no basis. The Government, of course, had the right to take the plaintiff's property, and the only question before this court is the question of whether it could take it without compensation. The Government also urges that the present claim will be "released" by payment to and acceptance by the plaintiff of $6,500,000 authorized but so far as we know not appropriated by an Act of Congress. There is a question as to whether that authorization applied to this action at all or related solely to the Markham Ferry project. In any event, the appropriation, including the conditions, is, of course, a unilateral action on the part of the United States and cannot bind the plaintiff, unless it gets the money and thereby or otherwise releases its rights.

The plaintiff is entitled to recover just compensation for the taking of its water rights and its franchise. The amount of recovery will be determined in further proceedings pursuant to Rule 38(c).

It is so ordered.

LITTLETON, *Judge* (*Ret.*) and LARAMORE, *Judge*, concur.

WHITAKER, *Judge*, dissenting:

The vice in the opinion of the majority stems from the concept embraced in this sentence from its opinion: "The State of Oklahoma *owns* the waters of the Grand River, a non-navigable stream * * *." The State of Oklahoma did not "own" the waters of the stream; it merely had the right to regulate and control the use of them for the benefit

of its citizens. "Ownership" by the state is a concept repugnant to the American theory of government; it is "con-
[fol. 144] trary to the genius of a free government." Under the American system of government, natural resources belong, not to the state, but to the people. The state is not the overlord, doling out privileges to his underlings; it is the servant of the people, chosen by them to administer their common resources for the benefit of all, according to their respective rights. Its sole right is that of regulation and control.

But this right of one of the states of the Union is subject to the superior right of the United States to regulate and control the waters of the river, in the interest of navigation and purposes related thereto. Because the United States had this superior right, it is not liable for the actions complained of.

That, in the opinion of the Chief Judge and me, is the essence of the case. If we are correct in our premise, there has been no taking of private property for public use for which the Fifth Amendment requires the payment of just compensation. Plaintiff, the state's agent, of course has no greater right than its creator, the State of Oklahoma.

The issue presented is a clash in the exercise of the powers of two sovereignties—on the one hand, the power of the Federal Government, under the Commerce Clause of the Constitution, to use and control the waters of a non-navigable tributary of a navigable stream, in the interest of navigation on the navigable stream; and, on the other hand, the power of a state to use and control those waters for irrigation, the production of power or otherwise, in the interest of its citizens. If the powers of the Federal Government extend to the right of regulation and control of the waters of a non-navigable tributary of a navigable stream to the extent necessary to control and improve navigation on the navigable stream, its power to do so supersedes the power of the state to use and control the waters of this stream.

That the powers of the Federal Government do extend to the control and use of the waters of a non-navigable stream for the improvement of navigation on a navigable stream to which it is tributary is settled by *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 523. Wherever this power comes in con-

flict with state power, the state power must yield. It was so held in *Oklahoma* v. *Atkinson Co., supra.* It had been so held long before in *United States* v. *Rio Grande Irriga-* [fol. 145] *tion Co.*, 174 U.S. 690. In that case the state sought to use the waters of the Rio Grande, far above the point where it was navigable, for irrigation, and had given the respondent the right to do so. The Supreme Court said the United States might enjoin such a use because it would interfere with the navigability of the river down stream. The Court said that the power of New Mexico to use those waters was "limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States." (Page 703.)

In *Florida* v. *Mellon*, 273 U.S. 12, 17, is was said: "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield," citing a number of cases.

In *Oklahoma* v. *Atkinson Co., supra*, the Federal Government had let a contract to respondent to erect a dam on the Red River some 500 mile above the point where it was navigable. Oklahoma sought to enjoin the erection of the dam, insisting that it was beyond the constitutional power of Congress to build it, and that the building of it would interfere with the state's own program for water development. In answer to the latter contention, the Supreme Court in an unanimous decision said, at pages 534-535:

> And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress. *United States* v. *Rio Grande Dam & Irrigation Co., supra*, p. 703; *New Jersey* v. *Sargent*, 269 U.S. 328, 337; *Arizona* v. *California*, 298 U.S. 558, 569; *United States* v. *Appalachian Power Co., supra.*

This is in harmony with the purpose declared by Congress in the Federal Power Act, 49 Stat. 846, to assume priority in the control of such waters. In section 23(b) of this Act, it is prohibited that any dam should be constructed by any "person, association, corporation, state, or municipality" on such a non-navigable stream until it receives a license

from the Federal Power Commission. The validity of this Act, as so construed, was sustained by the Supreme Court in *United States* v. *Appalachian Power Co.*, 311 U.S. 377. [fol. 146] When the Federal Government ousts the state government and takes control over the waters of the river, it has taken no property right of the Grand River Dam Authority, an agency of the State of Oklahoma; it has merely exercised its right to erect a dam at this place, which was superior to the right of the State of Oklahoma to do so, and, hence, superior to the right of its agency to do so. In doing so, it did not take private property for public use which it is required by the Constitution to pay just compensation.

When it decided to erect the dam the Federal Government did take certain lands, rights-of-way, and other easements that had been acquired by the Authority, but these have been paid for. The only thing that has not been paid for is the exclusion of Oklahoma and its agent from control and use of the waters of this river. The Federal Government having a superior right to use and control them, it does not have to pay the holder of a subordinate right for its exercise.

This necessarily follows from the holding in *United States* v. *Rio Grande Irrigation Co., supra.* As stated previously, that company undertook to appropriate all the unappropriated waters of the Rio Grande River in the State of New Mexico, in which state the Rio Grande River was non-navigable, but the Supreme Court held that the United States was entitled to an injunction to prevent this. If the United States may enjoin the appropriation of waters by a corporation authorized by a state to do so, the United States certainly does not have to pay the corporation for the deprivation of that right.

That case, if authority were needed, would seem to dispose of plaintiff's claim for compensation for the taking of its right to erect a dam at this place and, by so doing, to utilize the water power of the river.

The majority comes to a different conclusion because they start with a false premise, that this was a taking of private property for public use.

JONES, *Chief Judge*, joins in the foregoing dissenting opinion.

[fol. 147] FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and argument of counsel, makes findings of fact as follows:

1. The Grand River rises in Morris County, Kansas. It flows in a southeasterly direction to the vicinity of Wyandotte, Oklahoma, and then in a southerly direction until it joins the Arkansas River at a point not far from Muskogee, Oklahoma. The stream is known as the Neosho River in Kansas and as the Grand River in Oklahoma. (The Oklahoma designation will be used in the findings of fact, since this case involves an agency of the State of Oklahoma.) The Grand River is approximately 460 miles long and drains a total area of about 12,660 square miles. The principal towns in the watershed of the Grand River and its tributaries are Pittsburg, Parsons, Emporia, and Chanute in Kansas, Joplin and Neosho in Missouri, Miami and Vinita in Oklahoma, and Bentonville in Arkansas.

2. (a) The Grand River is a nonnavigable stream.

(b) The Arkansas River, of which the Grand River is a tributary, is a navigable stream.

3. The first extensive studies on the feasibility of developing the lower Grand River for flood control and hydroelectric power purposes were completed in 1932 by the Army Corps of Engineers, an agency of the defendant. Possible dam and reservoir sites at Pensacola, Markham Ferry, and Fort Gibson on the Grand River were considered. A report relative to these studies was published in 1935 as House Document No. 308, 74th Congress, 1st Session. The report concluded that Federal development of the lower reaches of the Grand River was not economically justified at that time.

4. On April 26, 1935, the State of Oklahoma enacted legislation (Session Laws of Oklahoma, 1935, Ch. 70, Art. 4, p. 350 *et seq.*) creating the Grand River Dam Authority (the plaintiff in this action) for the development of hydro-[fol. 148] electric power on the Grand River.[1] The fol-

[1] The statutory provisions quoted in findings 4 and 5 relative to the establishment and functions of the plaintiff have been amended in a number of respects since 1935. However, none of these amendments is especially significant from the standpoint of the present litigation.

lowing statutory language was used in establishing the plaintiff:

> There is hereby created within the State of Oklahoma a conservation and reclamation district to be Known as "Grand River Dam Authority" (hereinafter called the District), and consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Nowata, Ottawa, Rogers, Tulsa, Wagoner, Sequoyah, Osage, Washington, McIntosh, Creek, and Okmulgee. Such District shall be, and is hereby, declared to be a governmental agency and body politic and corporate, with the powers of government and with the authority to exercise the rights, privileges, and functions hereinafter specified, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries for irrigation, power and other useful purposes, the reclamation and irrigation of arid, semi-arid, and other lands needing irrigation, and the conservation and development of forests, water and hydro-electric power of the State of Oklahoma.

5. Among the powers, rights, and privileges conferred upon the plaintiff by the legislation creating it were the following:

> (a) To control, store and preserve, within the boundaries of the District, the water of Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;
>
> (b) To develop and generate water power and electric energy within the boundaries of the District;
>
> * * * * * * *
>
> (e) To acquire by purchase, lease, gift, or in any other manner, and to maintain, use and operate any and all property of any Kind, real, personal, or mixed, or any interest therein, within or without the boundaries of the District, necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act;

(f) To acquire by condemnation any and all property of any Kind, real personal, or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the [fol. 149] powers, rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation;

* * * * * * *

(i) To construct, extend, improve, maintain, and reconstruct, to cause to be constructed, extended, improved, maintained, and reconstructed, and to use and operate any and all facilities of any kind necessary or convenient to the exercise of such powers, rights, privileges and functions;

* * * * * * *

(o) To borrow money for its corporate purposes and, without limitation of the generality of the foregoing to borrow money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with any such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require, and to make and issue its negotiable bonds for moneys borrowed * * *.

6. Following its establishment in 1935, the plaintiff undertook the preparation of a comprehensive plan for the storage and control of the waters of the Grand River and its tributaries within the State of Oklahoma in order to make beneficial use of such waters for the development and generation of electric power and energy. By 1939, the plaintiff had developed a plan which contemplated the construction, maintenance, and operation by the plaintiff of three dam-and-reservoir projects on the Grand River, with hydroelectric generating units at the several projects. All were to constitute a single system functioning under unified control. The first of these projects was to be constructed at Pensacola, the second downstream from Pensacola at Markham Ferry, and the third downstream from

Markham Ferry at Fort Gibson. Under the plan, the Pensacola project was to provide the principal headwater and power storage, while the installations at Markham Ferry and Fort Gibson were to be "run of the river" plants. The plan contemplated that the water stored at Pensacola would be used three times for the generation of electric power and energy—first through the Pensacola unit, second through the Markham Ferry unit, and then through the Fort Gibson unit.

[fol. 150] 7. (a) While the preparation by the plaintiff of its comprehensive plan for the development of the water-power resources of the Grand River was in progress, further consideration was being given to the feasibility of a Federal development in that stream. Pursuant to a declaration of policy by the Congress in 1936, the Corps of Engineers conducted an investigation to determine the advisability of the construction by the defendant of three dams along the Grand River at Pensacola, Markham Ferry, and Fort Gibson. After public notice, a public hearing was held at Vinita, Oklahoma, on June 7, 1937. That meeting was called by the Corps of Engineers and was attended by various interested corporations, associations, private citizens, and officials of the State of Oklahoma and its agencies, including representatives of the plaintiff.

(b) At the hearing on June 7, 1937 mentioned in paragraph (a) of this finding, proposals for the construction by the defendant of three dams on the Grand River at Pensacola, Markham Ferry, and Fort Gibson were explained by representatives of the War Department.

(c) There was submitted at the hearing on June 7, 1937 a copy of a lengthy letter dated June 4, 1937 from the Director of the Division of Water Resources, Oklahoma Planning and Resources Board, an agency of the State of Oklahoma, to the District Office of the Corps of Engineers at Memphis, Tennessee, recommending the construction by the defendant of the three proposed projects at Pensacola, Markham Ferry, and Fort Gibson.

(d) At the hearing on June 7, 1937, the Chairman of the plaintiff's Board of Directors read and filed a statement which declared (among other things) that:

> The Grand River Dam Authority is ready to assume its responsibility. With the power given it by the

Oklahoma State Legislature we can and will issue bonds to carry out the part of the program as required by the United States Government.

a. Provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the projects, i. e., Pensacola, Marken [sic] Ferry, and Ft. Gibson Dams.

b. Hold and save the United States free from damages due to the construction works; to pay for all alterations to bridges, highways, railroads, pipelines, [fol. 151] telephone and telegraph lines, and alterations to other existing improvements made necessary as a result of the construction.

c. Maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of War.

In so many words the Grand River Authority with its power to issue 15 million dollars worth of bonds, is ready at all times to cooperate with the government in construction of these dams. We can meet any requirement you make upon us. Gentlemen, we are Rarin' to go, *lets* build the Grand River Dams.

(e) In a report which was published in 1939 as House Document No. 107, 76th Congress, 1st Session, the Corps of Engineers recommended the construction and operation by the defendant of three dam-and-reservoir projects on the Grand River at Pensacola, Markham Ferry, and Fort Gibson. It was proposed in the report that the three projects be operated as one coordinated system in the combined interest of flood control and power development.

8. (a) In the meantime, the plaintiff began the construction of its contemplated dam and reservoir at Pensacola in 1938. The construction of this project by the plaintiff was financed by the Public Works Administration, an agency of the defendant, which made a grant to the plaintiff in the amount of $8,500,000 and a loan to the plaintiff in the amount of $11,500,000.

(b) On May 12, 1939, the plaintiff was authorized by the Oklahoma State Legislature to issue bonds in the aggregate amount of $10,000,000 for the construction of the

plaintiff's proposed projects at Markham Ferry and Fort Gibson.

(c) On July 26, 1939, the plaintiff obtained from the Federal Power Commission, an agency of the defendant, a license (No. 1494) for the operation of its Pensacola project. This license contained the following provisions (among others):

> Article 1. This license is issued for a period of fifty (50) years from January 1, 1939, and in consideration hereof and the benefits and advantages accruing hereunder to the Licensee, it is expressly agreed by the Licensee that the entire project, project area, and project works, as hereinafter designated and described, [fol. 152] whether or not located in, on, or along said Grand River or upon reservations of the United States, shall be subject to all the terms and conditions of this license.
>
> . . . . . .
>
> Article 13. The Licensee is hereby authorized to operate the reservoir in such manner as to utilize storage space below elevation 745 for power production purposes but not to utilize any storage space above said elevation 745 for power production purposes except during periods when the reservoir is being operated for the control of floods. The storage capacity between elevations 745 and 755 shall be expressly reserved for the control of floods. The Licensee shall impound flood waters in the storage space between elevations 745 and 755, and release flood waters therefrom, when, as, and in the manner directed by the Secretary of War, or his authorized representative: provided, that the Licensee shall not be required to impound any water above elevation 750 until the United States has acquired the necessary flowage rights above that elevation.
>
> Article 14. Subject to the provisions of Article 13, the operation of the project by the Licensee, so far as such operation may affect the use, storage, and discharge from storage, of waters, shall at all times be subject to the control of the Secretary of War under

such rules and regulations as he may prescribe in the interests of navigation and flood control, and subject to the control of the Commission under such rules and regulations as it may prescribe for the safety of the dam and for the protection of life, health, and property.

* * * * * * *

Article 20. The Licensee shall interpose no objections to nor in any way prevent the use of water for domestic purposes by persons or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works.

* * * * * * *

Article 26. * * * The Licensee further agrees, on behalf of itself, its successors and assigns, that, in the event the project is taken over by the United States upon the termination of this license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, it will be responsible for and will make good any defect of title to or of right of user in any such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge or will assume [fol. 153] responsibility for payment and discharge of all liens or incumbrances upon the project or project property created by said Licensee or created or incurred after the issuance of this license * * *.

(d) The plaintiff completed the construction of its Pensacola project in 1940. When completed, the project had a storage capacity of approximately 1,680,000 acre-feet at a maximum power-pool elevation of 745 feet above mean sea level, additional storage for flood control of approximately 520,000 acre-feet at elevation 755 above mean sea level, and a hydroelectric power plant with an initial installation of 80,000 kilowatts (which has since been increased to 90,000 kilowatts).

(e) During the period 1939-1940, the plaintiff acquired lands, easements, and rights-of-way, and constructed trans-

mission lines, substations, and facilities, for the connection and integration of its Pensacola project with its contemplated Markham Ferry and Fort Gibson units. The plaintiff also had surveys, plans, and specifications made for the construction of its proposed Markham Ferry and Fort Gibson units.

9. On June 24, 1941, the Secretary of War, in pursuance of the authority conferred on him by Articles 13 and 14 of the license issued by the Federal Power Commission in connection with the plaintiff's Pensacola project (see finding 8 (c)), approved the following regulations to govern the operation of that project in the interest of flood control:

> 1. Whenever the elevation of the reservoir exceeds elevation 745, the discharge facilities shall be operated so as (a) to reduce as much as practicable the flood damage below the reservoir and (b) to limit the elevation of the reservoir to elevation 750.
>
> 2. The District Engineer, Engineer Department at Large, in charge of the locality shall advise the [Grand River Dam] Authority when inflow rates are anticipated which may raise the elevation of the pool above elevation 745, and the maximum rate of release allowable. The Authority shall then take such measures to increase the storage capacity of the reservoir available for the control of floods as are not inconsistent with the development of power.
>
> 3. The Authority shall inform the District Engineer daily, promptly after taking the morning observations, as to the elevation of the resevoir pool and the tail [fol. 154] water, and the rates of release for the preceding 24 hours. Whenever the pool is above elevation 745 the Authority shall submit these reports by telegraph or telephone as directed by the District Engineer, supplemented by such additional telegraphic or telephonic reports as may be required by the District Engineer in the interest of flood control.

10. In the Flood Control Act of August 18, 1941 (55 Stat. 638, 645), Congress (among other things) modified a previously approved comprehensive plan for flood control and other purposes in the Arkansas River Basin by incorpo-

rating in the plan the three dam-and-reservoir projects on the Grand River at Pensacola, Markham Ferry, and Fort Gibson recommended by the Corps of Engineers in 1939 (see finding 7 (c)). The appropriation of funds for the construction of such works (among others) was authorized.

11. On November 21, 1941, the defendant took possession of the plaintiff's Pensacola project in accordance with the provisions of Executive Order 8944 (6 F.R. 5947). Thereafter, the project was operated by the defendant for national defense purposes until September 1, 1946, when it was returned to the plaintiff by the defendant.

12. (a) While the plaintiff's Pensacola project was being operated by the defendant for national defense purposes, plans were set in motion for the construction by the defendant of a dam and reservoir on the Grand River at Fort Gibson, in accordance with the congressional authorization mentioned in finding 10. A public hearing to consider the project was called and held by the Corps of Engineers at Muskogee, Oklahoma, on January 27, 1942.

(b) The Director of the Oklahoma Planning and Resources Board appeared at the hearing on January 27, 1942 and, on behalf of the Board, endorsed the proposal for the construction of a dam and reservoir at Fort Gibson by the defendant.

(c) Delay in the formulation of definite plans for the construction by the defendant of a dam-and-reservoir project at Fort Gibson was encountered because of the shortage of construction materials during World War II.

13. (a) In a letter dated December 24, 1943 and addressed to the War Department, the plaintiff stated that it desired that its property interest in the waters of the [fol. 155] Grand River be duly recognized in connection with the proposed construction of a Federal dam-and-reservoir project at Fort Gibson, and that it be paid just compensation for any appropriation of its water rights.

(b) In a reply dated January 6, 1944, the Chief of Engineers stated in part as follows:

> • • • I am pleased to assure you that if and when the Fort Gibson project is constructed, the property owners affected will be paid just compensation for property taken, within the meaning of the Federal Constitution.

However, this office does not consider that the action of the Oklahoma legislature in providing for the future development of the Fort Gibson site by the Grand River Dam Authority had the effect of creating property for which compensation must be paid by the Federal Government.

14. (a) In a letter dated September 25, 1945 from the Governor of Oklahoma to the Chief of Engineers, it was stated (among other things) as follows:

> Acting for the State of Oklahoma and in compliance with the requirements of Public Law 534 of the Seventy-eighth Congress, second session, I am pleased to approve the plans submitted for the comprehensive development of the Arkhansas River in this State, subject, as you also recommend, to such modification as later study may find desirable.
>
> The engineering and economic record of this report is complete and voluminous. I quite agree with your opinion that public benefits, especially from navigation, will greatly exceed the estimates of the report.
>
> I congratulate you upon the part you have played in developing this program and thank you for expediting its approval. It indicates a most worth-while development of the Arkansas Basin and forecasts prosperity and happiness for our people. I am unable to find words with which to express my commendation for your able and progressive leadership before and during the war in originating and developing this program
> * * *.

(b) The comprehensive plan mentioned in the letter of September 25, 1945 from the Governor of Oklahoma included the proposed construction by the defendant of a dam and reservoir at Fort Gibson on the Grand River.

15. (a) A letter was written by the plaintiff to the Chief of Engineers on February 14, 1946 relative to the antici- [fol. 156] pated issuance by the Corps of Engineers of an invitation for bids on the construction of the Federal dam and reservoir at Fort Gibson. This letter stated (among other things) that:

> The Authority now wishes to call your attention to the fact that the construction of this project by the Federal

Government will not only take and appropriate the Authority's water rights in Grand River but will appropriate and take other properties and rights of the Authority.

The letter further stated that the construction of the dam and reservoir at the Fort Gibson site by the Corps of Engineers would affect the property and rights of the plaintiff as follows:

1. The appropriation of lands, rights of way, easements, transmission lines and facilities, which the Authority has rightfully acquired and constructed for the purpose of connecting the Pensacola unit with the Markham's Ferry and Fort Gibson units.

2. The appropriation and making beneficial use of the waters of Grand River for the generation, distribution and sale of hydroelectric power and energy to the exclusion of the Authority.

3. The taking and converting to the Government's benefit of the vested property rights of the Authority in the Fort Gibson unit which were created by the construction and operation of the Pensacola dam and reservoir (head-water improvement), thereby preventing the Authority from utilizing said head-water benefits created by the Pensacola unit.

4. The taking of the Authority's right and franchise to develop, generate, distribute and sell electricity and electric energy at the Fort Gibson unit.

(b) In a reply dated March 11, 1946 to the letter of February 14, 1946 from the plaintiff, the Chief of Engineers stated (among other things) that he did not believe that it would be necessary for the defendant to pay compensation for the intangible rights claimed by the plaintiff in its letter. The Chief of Engineers further stated, however, that the obligation of the defendant to pay just compensation for any physical property of the plaintiff which might actually be taken for the proposed Fort Gibson project of the defendant was recognized.

16. Thereafter, construction of a dam-and-reservoir proj- [fol. 157] ect at Fort Gibson on the Grand River was begun by the Corps of Engineers on May 22, 1946, and was com-

pleted on June 15, 1950. Construction of a power house at the project was completed on June 30, 1953.

17. The Fort Gibson project was constructed by the defendant as an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of hydraelectric power on the Arkansas River, a navigable waterway, and its tributaries. The project has been operated to carry out these purposes.

18. (a) The defendant's Fort Gibson dam is located on the Grand River at a point approximately 50 miles below the plaintiff's Pensacola project, and near the site of the plaintiff's contemplated Fort Gibson dam. It has at present an installed generating capacity of approximately 49,000 kilowatts, with provision to add additional generating capacity of 25,000 kilowatts in the future. The bottom of the power pool is at elevation 551 above mean sea level, and the top of the power pool is at elevation 554 above mean sea level. There is storage capacity between elevation 554 and elevation 582 that is reserved for the control of flood waters.

(b) The defendant's Fort Gibson project is a "run of the river" project; i.e., its reservoir provides pondage sufficient for fluctuations of inflow only over short periods of time, with a maximum drawdown of not more than three feet. There is sufficient pondage, based on all flows out of the plaintiff's Pensacola project, to produce 9,000 kilowatts of continuous power for only 13 days. The production of power at Fort Gibson is dependent upon releases of water from the plaintiff's Pensacola project.

19. (a) During the course of the construction by the defendant of its Fort Gibson project, a suit was instituted by the defendant in the United States District Court for the Northern District of Oklahoma[2] to condemn certain lands for use in connection with the project. Among the lands which the defendant was attempting to acquire by condemnation in that proceeding was a 70-acre tract belonging to the plaintiff. The plaintiff appeared in the

---

[2] The style of the condemnation suit was United States v. 1,031.15 acres of land, more or less, situate in Mayes County, Oklahoma, and Ray Bonnella, Grand River Dam Authority, et al. (No. 2116-Civil).

[fol. 158] condemnation proceeding and took the position that the Secretary of War, at whose request the suit had been instituted, lacked the authority to condemn its land. The court held against the plaintiff on this issue. Thereafter, the plaintiff filed with the court an application for a distribution of compensation with respect to the land in question.

(b) It became necessary for the defendant, in connection with the development of its Fort Gibson project, to acquire flowage rights over certain lands owned by the plaintiff, and to provide for the relocation of a trasmission line operated by the plantiff. An agreement providing for the conveyance by the plaintiff of flowage easements to the defendant, and the relocation of the plaintiff's transmission line, was entered into between the defendant and the plaintiff on February 6, 1950. Under the agreement, the defendant paid to the plaintiff the sum of $210,140.80.

20. (a) In April 1954, the plaintiff sought to institute before the Federal Power Commission a proceeding against the defendant, the Secretary of the Army, and the Secretary of the Interior relative to the defendant's Fort Gibson project. In its petition, the plaintiff alleged (among other things) that the defendant's Fort Gibson project, without the use and aid of the storage and headwater improvements of the plaintiff's Pensacola project, was incapable of producing any firm electric power and energy; that through the use of the plaintiff's storage and headwater improvements at the Pensacola project, the defendant was able to produce at its Fort Gibson project approximately 94,600,000 kwh of firm energy per year; and that since about May 1, 1953, the defendant had been operating its Fort Gibson project and had been making use of the plaintiff's water storage and headwater improvements for the production and generation of electric power and energy, but had not paid or offered to pay to the plaintiff any compensation on account of such benefits. The plaintiff requested the Commission (among other things) to:

> * * * make and enter an Order determining and fixing the reasonable and equitable annual charges to be paid to the licensee by the United States for the benefits accruing to the Fort Gibson Power Project from the li-

[fol. 159] censee's storage and headwater improvements at its Pensacola Project * * *.

(b) In a letter dated June 11, 1954 from the Secretary of the Federal Power Commission to the plaintiff, it was stated (among other things) as follows:

> Section 10 (f) of the Federal Power Act does not provide for the assessment of headwater benefit charges to projects constructed and operated by the Federal government. Your petition is therefore not acceptable for filing and is returned herewith.

(c) Thereafter, the plaintiff sought and obtained a review by the United States Court of Appeals for the Tenth Circuit of the action of the Federal Power Commission in rejecting the petition mentioned in this finding. In a decision dated July 12, 1957 (246 F. 2d 453), the Court of Appeals upheld the Commission's action. Among other things, the court said (at p. 455) that Section 10 (f) of the Federal Power Act, as amended:

> * * * does not vest in the Commission power or authority to assess charges against the Fort Gibson project for benefits received from the headwater facilities at the Pensacola site. The subsection makes specific reference to the United States as one entitled under certain circumstances to receive compensation for headwater benefits. But no specific reference is made to the United States as one liable for the payment of compensation for benefits of that kind. In view of the specific reference to the United States in one instance and the absence of any specific reference to it in the other, there is no basis upon which it can be inferred or implied that Congress intended or purposed to include the United States among the owners of non-licensed projects liable for payment of compensation for upstream benefits. * * *

(d) The plaintiff did not apply to the Supreme Court for a writ of certiorari in connection with the decision of the United States Court of Appeals for the Tenth Circuit mentioned in paragraph (c) of this finding. Therefore, the judgment of the Court of Appeals is a final judgment.

21. (a) While the various events mentioned in findings 12-20 relative to the defendant's Fort Gibson project were transpiring, the plaintiff was endeavoring to proceed with [fol. 160] the construction of its proposed project at Markham Ferry on the Grand River.

(b) On August 9, 1946, the plaintiff filed with the Federal Power Commission an application for a preliminary permit under the Federal Power Act for a proposed hydroelectric development at Markham Ferry.

(c) By an order dated January 18, 1949, the Federal Power Commission dismissed the plaintiff's application referred to in paragraph (b) of this finding. The reason given by the Commission for such action was that the Congress had authorized the construction of a Federal project at Markham Ferry (see finding 10).

(d) In the act of July 6, 1954 (68 Stat. 450), Congress further modified the comprehensive plan for the development of the water resources of the Arkansas River Basin, as previously approved and modified (see finding 10), so as to authorize the construction of the Markham Ferry project on the Grand River by the plaintiff. The act also authorized the appropriation of not to exceed $6,500,000 as a monetary contribution by the defendant for flood control storage in the Markham Ferry project, and then provided (among other things):

> * * * That the acceptance by the Grand River Dam Authority of the foregoing amount shall constitute the agreement of the Grand River Dam Authority to hold and save the United States free and harmless from all claims heretofore or hereafter asserted of whatever nature including but not limited to acquisition of land, relocation, construction, operation and maintenance of the dam and reservoir * * *.

(e) By a letter dated August 12, 1954, the plaintiff again requested the Federal Power Commission to issue a license to it for the Markham Ferry project.

(f) In a letter dated August 19, 1954 and addressed to the Corps of Engineers, the plaintiff requested that there be placed in the Federal budget for the ensuing fiscal year an item calling for the appropriation of the $6,500,000 authorized in the act of July 6, 1954. The evidence does not

show whether this sum has ever been appropriated by the Congress and made available to the plaintiff.

[fol. 161] (g) On June 22, 1955, the Federal Power Commission issued an order granting to the plaintiff a license (No. 2183) for the construction and operation of the Markham Ferry project.

22. (a) Among the terms and conditions of the license that was issued to the plaintiff by the Federal Power Commission for the Markham Ferry project were the following:

> Article 12. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army. Such rules and regulations may include the construction, maintenance, and operation by the Licensee, at its own expense, of such lights and signals as may be directed by the Secretary of the Army.
>
> Article 13. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee so far as they affect the use, storage, and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or

as the Commission may prescribe for the other purposes hereinbefore mentioned.

* * * * *

Article 17. * * * In the event the project is taken over by the United States upon the termination of the license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, the Licensee, its successors and assigns [fol. 162] will be responsible for and will make good any defect of title to or of right of user in any of such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge, or will assume responsibility for payment and discharge, of all liens or incumbrances upon the project or project or property created by the Licensee or created incurred after the issuance of the license * * *.

(b) Article 12 was deleted by an order of the Commission issued on December 13, 1954.

(c) Article 13 was amended by an order issued by the Commission on December 13, 1954, and was amended again by an order issued by the Commission on March 22, 1957. As amended the second time, Article 13 reads as follows:

The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they effect the use, storage and discharge from storage of waters above the dead storage pool (dead storage pool being that portion of the pool which is not used for operational purposes), shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation and flood control, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the

Licensee shall release water from the project reservoir above the dead storage pool at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation or flood control, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

23. The Board of Directors of the plaintiff has never granted to the defendant, or to any department or agency thereof, any franchise, right, or privilege to develop and generate electric power and energy on the Grand River in Oklahoma, or any right, title, or interest in and to the waters of the Grand River for the production of electric power and energy, or any right to control, supervise, conserve, and develop the water power at the Fort Gibson dam [fols. 163-164] and reservoir project.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, together with interest thereon, as part of just compensation and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38(c).

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[fols. 165-166] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 167-168] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No.

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 8, 1959.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 30th, 1959.

Earl Warren, Chief Justice of the United States.

Dated this 8th day of October, 1959.

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[fol. 169] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 503

UNITED STATES, Petitioner

vs.

GRAND RIVER DAM AUTHORITY

ORDER ALLOWING CERTIORARI.—December 14, 1959

The petition herein for a writ of certiorari to the United States Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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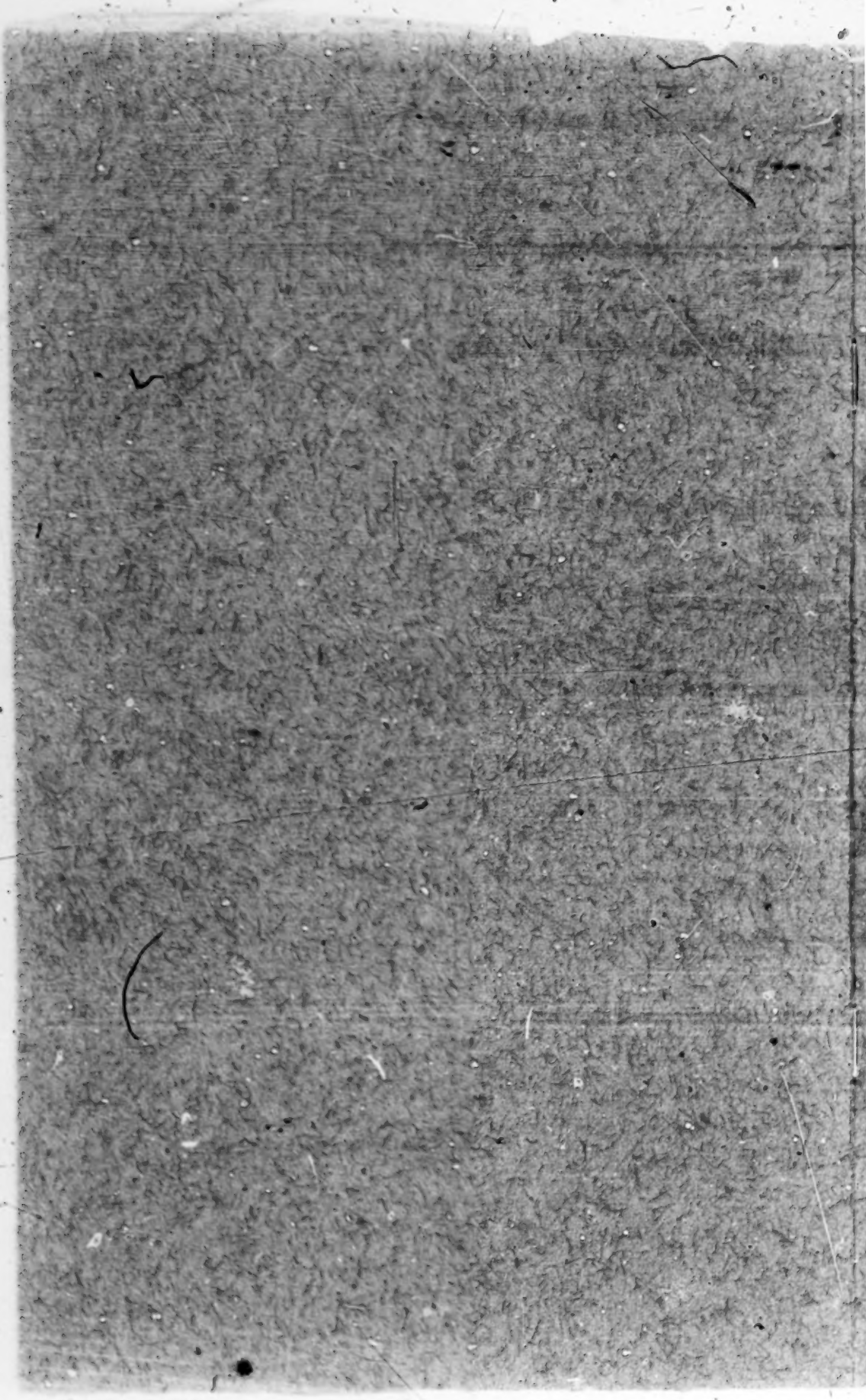

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No. 503

# In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

*v.*

GRAND RIVER DAM AUTHORITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

J. LEE RANKIN,
*Solicitor General,*
PERRY W. MORTON,
*Assistant Attorney General,*
ROGER P. MARQUIS,
*Attorney,*
*Department of Justice, Washington 25, D.C.*

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529015—59——1

# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ——

UNITED STATES OF AMERICA, PETITIONER

*v.*

GRAND RIVER DAM AUTHORITY

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on July 15, 1959.

## OPINIONS BELOW

The opinions of the Court of Claims (Appendix, *infra*, pp. 1–25) are reported at 175 F. Supp. 153.

## JURISDICTION

The judgment of the Court of Claims was entered on July 15, 1959. On October 8, 1959, the time within which to petition for a writ of certiorari was extended, by order of the Chief Justice, to October 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

## QUESTION PRESENTED

Whether the federal navigation servitude extends to tributary streams which, though not themselves navigable, affect navigation, thus immunizing the United States, when it builds a dam upon such a stream for purposes which include the improvement of navigation and the control of floods, from liability to a State (or its agency) for depriving the latter of the economic opportunity to exploit the power potential of the waters.[1]

## STATEMENT

Although there is a lengthy history of federal-state transactions in relation to the Grand River, the facts which bear on the present controversy may be summarized briefly as follows:

The Grand River (known as the Neosho River in Kansas where it originates) is a non-navigable stream which joins the navigable Arkansas River near Muskogee, Oklahoma. The Grand River Dam Authority, a state agency created in 1935 to develop the water power of the river, prepared a plan calling for unified operation of three dam and reservoir projects designated Pensacola, Markham Ferry, and Fort Gibson. At approximately the same time, the United States Army Engineers recommended a similar three-dam project to Congress, but Congress took no immediate action.

Subsequently, the Authority undertook construction of a dam at Pensacola, completing it in 1940. This was done pursuant to a license from the Federal Power Commission, which had found that the project

[1] See, also, the final paragraph of our concluding footnote (fn. 6, *infra*).

would affect the interests of interstate commerce. See *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, 366. The license required that the project be operated under federal control, in the interests of navigation and flood control, and appropriate regulations to this end were issued in 1941. The United States furnished $20,000,000 for the Pensacola dam, $8,500,000 in the form of a grant, $11,500,000 in the form of a loan.

The three-dam proposal of the Corps of Engineers was approved by Congress in 1941 as part of a comprehensive plan for the improvement of the Arkansas River Basin, but further execution was delayed until after World War II. Construction of the Fort Gibson project was commenced by the United States in 1946 and completed in 1950. During the planning and construction phases of the Fort Gibson project, the State Authority asserted that it was entitled to compensation for rights which it alleged would be taken by the execution of the federal plan. The Corps of Engineers agreed that compensation would be paid for any physical property taken, but denied that compensation was owing for the alleged taking of intangible rights asserted by the Authority. The Authority was paid, as a result of condemnation proceedings, for a 70-acre tract which it owned. By agreement, it was further compensated for flowage easements over certain lands and for the relocation of a transmission line. In a proceeding before the Federal Power Commission, it claimed additional compensation based on the storage and headwater improvement benefits which the Pensacola project allegedly contributed to the Fort Gibson project. This claim

was denied by the Commission, and its ruling was sustained on appeal. *Grand River Dam Authority* v. *Federal Power Com'n*, 246 F. 2d 453 (C.A. 10).

Meanwhile, in 1946, the Authority had sought a Federal Power Commission permit for the Markham Ferry project. This was originally denied on the ground that Congress had authorized a federal project. However, Congress, by the Act of 1954, authorized construction by the Authority of the Markham Ferry project, and the Authority was thereupon issued a license by the Federal Power Commission. That license reserved federal control of the operation in the interests of navigation and flood control.[2]

The Authority sought, in the instant suit, to recover $10,000,000 on claims described by the majority opinion of the Court of Claims as follows: (1) Its water power rights at the Fort Gibson unit. (2) Its exclusive franchise to develop electric power and energy at the Fort Gibson unit. (3) Certain items of severance damages, including storage and headwater benefits accruing to the Pensacola unit from the Fort Gibson unit; the cost and value of surveys, plans and specifications for the Fort Gibson unit; and the loss of the use and value of certain lands and rights-of-way theretofore acquired for the interconnection of

[2] The 1954 Act authorized a $6,500,000 appropriation as a federal contribution because of flood control benefits, with a "release clause" when that amount should be received by the Authority. We understand, contrary to the implication of the majority opinion and the findings, that this sum has been appropriated. However, it has not yet been paid; hence it would be premature to discuss here the question whether acceptance would constitute a release of the present claims.

the Fort Gibson unit with the Authority's system and for the distribution of electric power and energy from the Fort Gibson unit.

The majority of the Court of Claims held that the United States was liable on the first two claims. The amount of recovery was left to further proceedings. Two judges dissented on the ground that there was no taking of private property but simply the exercise of the superior right of the United States to erect the Fort Gibson dam in aid of navigation and commerce.

## REASONS FOR GRANTING THE WRIT

1. "The Fort Gibson project," in the words of the opinion below (App., *infra*, p. 2), "was constructed by the [United States] as an integral part of a comprehensive plan for the improvement and regulation of navigation, the control of floods, and the production of hydroelectric power on the Arkansas River and its tributaries." The claim for compensation which the court below has allowed is based upon asserted water rights of the State of Oklahoma. The State Authority, we emphasize, has been paid for all physical properties which it owned and there is no claim here to ownership of lands adjacent to the dam site or to the reservoir. The essence of the claim is simply that the Authority has been deprived by the United States of the economic opportunity to build a dam at the Fort Gibson site.[3]

[3] The Government's dam does not result in the removal of any water from the State of Oklahoma. The water is merely arrested in its flow and used to produce hydroelectric power before it continues downstream.

If the Grand River were a navigable stream, rather than a tributary of a navigable stream, there could be no question, as the Court of Claims recognized, that the United States would have plenary control and that it would be immune from the type of claim presented here. As was made unmistakably plain as early as this Court's decision in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, there can be no compensable rights, as against the United States, in the flow of a navigable stream.[4] The federal power over navigation, which has its foundation in the Commerce Clause, "is a dominant one which can be asserted to the exclusion of any competing or conflicting one." *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224–225. Moreover, "[i]f the interests of navigation are served, it is constitutionally irrelevant that other purposes may also be advanced." *Id.*, p. 224.

The principal issue here is whether the powers and immunities of the United States are different because the Fort Gibson dam is located on a non-navigable tributary of the Arkansas River, rather than on the

[4] In that case, an Act of Congress had revoked the license under which the Chandler-Dunbar Company maintained works in the St. Marys River and had authorized the Secretary of War to condemn property abutting that navigable river. The trial court awarded the company $550,000 as compensation for its "exclusion from the use of the water power inherent in the falls and rapids" of the river (229 U.S. at 59). This Court held the allowance erroneous, stating (p. 66) that "the flow of the stream was in no sense private property" and (p. 69) that the very notion "that the running water in a great navigable stream is capable of private ownership is inconceivable."

navigable Arkansas itself. This is an issue on which this Court has previously granted certiorari. The question in *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, was whether a riparian owner of lands condemned in connection with the Tennessee Valley development was entitled to "power site" value. There, as here, the dam in question was located above the head of navigation. The Court, however, in deciding the merits, found it unnecessary to reach the issue because it concluded that in any event the landowner could not establish, on ordinary valuation principles, the existence of the "power site" value which he asserted.[5] The issue thus remains one as to which this Court has not yet definitively spoken.

[5] This Court stated in pertinent part (319 U.S. at 273):

"It is argued on behalf of petitioner that even though the Hiwassee River is non-navigable throughout this part of its course, compensation for the loss of any supposed power value is no more permissible than in case of a navigable stream. It is pointed out that *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, held that there is 'no private property in the flow' of a navigable stream. *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 427. And it is contended that although the Hiwassee River is non-navigable at the points in question, the flow at those places has such a direct and immediate effect upon the navigable portion of the river farther downstream as to give the United States the same plenary control over both the navigable and non-navigable portions of the river (*United States* v. *Appalachian Power Co.*, *supra*; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508), thereby bringing into play the rule of the *Chandler-Dunbar* case. Cf. *United States* v. *Kelly*, 243 U.S. 316. We do not stop to consider that question. For if we assume, without deciding, that rights in the 'flow' of a non-navigable stream created by local law are property for which the United States must pay compensation when it condemns the lands of the riparian owner, the water power value which respondent sought to establish cannot be allowed."

2. The issue is plainly one of substantial and continuing importance; it has a vital bearing upon public projects in which the Government is presently engaged and projects which it may undertake in the future. In our petition in the *Powelson* case, we advised the Court (No. 3, October Term, 1942, Petition, pp. 14–15):

> * * * The unified development of the river systems of the country for the purposes of promoting navigation, controlling destructive floodwaters, developing the watershed, and recovering the cost of improvements through the utilization and sale of power is a subject of ever-increasing importance to the Federal Government. Such developments involve the construction of storage dams located on the upper reaches of the river or on its tributaries above the head of navigation, which nevertheless play an essential part in the regulation of the flow of the river system in the interests of navigation and flood control. A determination by this Court of the extent of the Government's liability where it * * * [builds such] dams is thus of great importance to the Government * * *.

The same holds true today.

3. Although the precise issue raised by this litigation has not yet been decided by this Court, we believe that the logic of the Court's prior decisions relating

to the scope of the navigation servitude requires a reversal of the decision below.

Approximately sixty years ago, this Court held in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, that the prohibition enacted in the Rivers and Harbors Act of 1890 against obstructions to navigable capacity extended to the non-navigable reaches of navigable streams. The *Chandler-Dunbar* case, although it involved a navigable river, similarly rested upon the concept that the United States has plenary power over all aspects of navigation. See, also, *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 427, and *United States* v. *Willow River Co.*, 324 U.S. 499, 509. In *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, the State of Oklahoma sought to enjoin a project undertaken by the federal government as part of a comprehensive flood-control program. The dam involved in that case was to be constructed some hundreds of miles above the point where the Red River was used for navigation. This Court nonetheless held it "clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions" (313 U.S. at 523).

If it is clear that the plenary power of the United States to control navigation extends to streams which affect navigation, it follows, we believe, that there can be no more warrant for imposing liability upon the United States when, in the exercise of the commerce power, it controls the flow of a non-navigable

tributary than when it takes such action on the navigable stream itself. As stated by the dissenting judges below (App., *infra*, p. 6), "If the powers of the Federal Government extend to the right of regulation and control of the waters of a non-navigable tributary of a navigable stream to the extent necessary to control and improve navigation on the navigable stream, its power to do so supersedes the power of the state to use and control the waters of this stream."

This view also finds inferential support in an earlier case involving this respondent and another project on the Grand River. *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359. In that case, the Authority had a license from the Federal Power Commission covering the construction of a dam near Pensacola. Proceeding under state law and relying upon Oklahoma's law of condemnation, the Authority condemned certain riparian lands required for the project. The Supreme Court of Oklahoma held that it was obliged to pay the condemnees for all possible uses, including "power site" use, to which the land might legally be put. This Court affirmed that holding, but it did so on the express ground that the Authority had sought to condemn the property in reliance upon Oklahoma's law of condemnation and not in its capacity as a federal licensee. The Court observed that the considerations might be "different" if "either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act" (p. 373). The opinion adds, "The United

States enjoys special rights and power in relation to navigable streams *and also to streams which affect interstate commerce*" (*ibid.;* emphasis added).

The dissenting opinion in *Grand-Hydro* (in which four Justices joined) objected to the decision on the ground that water power value ought not be allowed whether the condemnation is instituted under the authority of federal or state law. In relation to the scope of the commerce power, the dissenters observed (p. 375, fn. 1):

> The exclusive control which the United States has in the water power of a navigable stream (*United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69; *United States* v. *Appalachian Electric Co.*, 311 U.S. 377, 427–428) extends to the water power of a non-navigable stream where private command over it is inconsistent with the federal program of control over navigation. *United States* v. *Willow River Co.*, 324 U.S. 499, 509. Federal regulation and control has the same effect in each case. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 525.

In short, both the majority and dissenting opinions in the *Grand-Hydro* case appear to recognize that action taken by the United States in the interest of commerce control has the same effect irrespective of whether the stream in question is a navigable one or one which, though not navigable, affects navigation.[6]

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[6] Cases like *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, and *United States* v. *Cress*, 243 U.S. 316, upon which the court below relied, relate to the taking of lands above high-water mark and are not relevant to the question whether

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*
PERRY W. MORTON,
*Assistant Attorney General.*
ROGER P. MARQUIS,
*Attorney.*

OCTOBER 1959.

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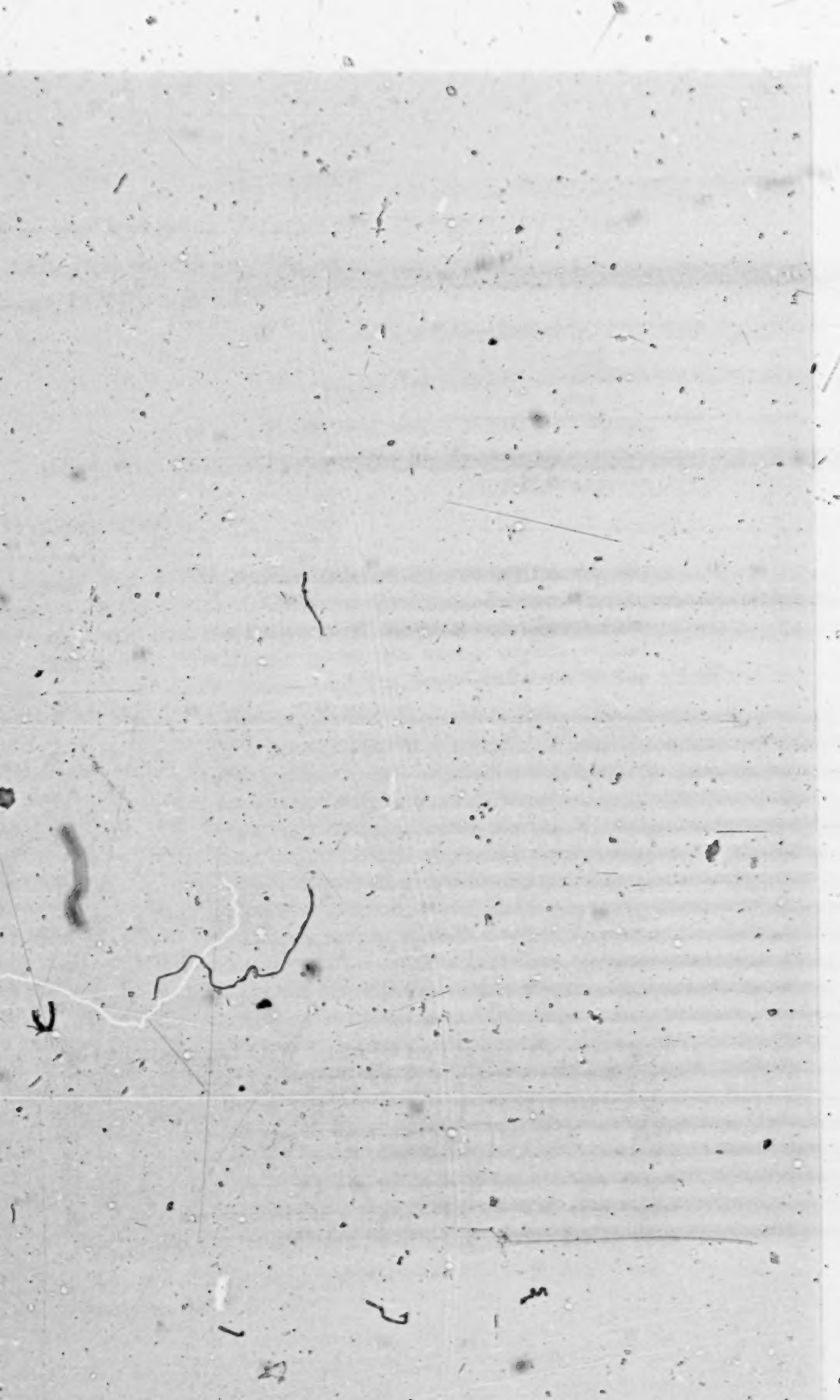
Oklahoma had a compensable interest in the waters of the stream.

We note also that the majority of the Court of Claims took the position that "Oklahoma owns the waters of the Grand River, a non-navigable stream, and the State conferred on the plaintiff all the rights which it possessed in the stream" (App., *infra*, p. 4). It was solely on this assumption as to state ownership of the waters of the river that the Court of Claims based its conclusion that a property right was invaded. If we are correct in our view that the dominant navigation servitude extends to the waters of the Grand River and that Oklahoma's interests are therefore subordinate, it becomes unnecessary to attempt to define Oklahoma's interest in terms of property law. Nonetheless, we submit that the court below erred in its assumption that Oklahoma (a public lands state) owns the waters of the Grand River and that a compensable right to use those waters was conferred upon the Authority. The issue of title to unappropriated waters, left open in *Nebraska* v. *Wyoming*, 325 U.S. 589, 611–616, and *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 290, is one of far-reaching importance. It is directly involved in *Arizona* v. *California*, now pending in this Court, No. 9, Original. The conclusion reached in the majority opinion below is inconsistent, in our view, with the decisions of this Court in *Winters* v. *United States*, 307 U.S. 564, and *Federal Power Commission* v. *Oregon*, 349 U.S. 435. And see *United States* v. *Rio Grande Irrigation Co.*, *supra*, 174 U.S. at 704, and *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142.



# APPENDIX

# In the United States Court of Claims

No. 226-56

(Decided July 15, 1959)

## GRAND RIVER DAM AUTHORITY v. THE UNITED STATES

*Mr. Q. B. Boydstun* for the plaintiff.

*Mr. Herbert Pittle*, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for the defendant.

### OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, the Grand River Dam Authority, is an agency of the State of Oklahoma, upon which the State of Oklahoma had conferred the right "To control, store and preserve, within the boundaries of the District, the water of Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;" and "To develop and generate water power and electric energy within the boundaries of the District."

Pursuant to the power granted to it, the Authority made a survey of the Grand River and adopted a plan which contemplated the erection of a dam at Pensacola, and one at Markham Ferry, and one at Fort Gibson. With funds supplied by the defendant, a grant of $8,500,000 and a loan of $11,500,000, it completed the erection of a dam at Pensacola in 1940. On May 12, 1939, the Legislature of Oklahoma authorized the plaintiff to issue $10,000,000 of bonds for the construction of dams at Markham Ferry and at Fort Gibson, and by 1940 it had acquired lands, easements, and rights-of-way, and had constructed transmission lines, substations and other facili-

ties for the connection of the Pensacola project with its contemplated Markham Ferry and Fort Gibson dams.

However, before anything further had been done by the plaintiff, Congress, on August 18, 1941, passed the Flood Control Act (55 Stat. 638, 645), which authorized, among other things, three dam-and-reservoir projects on the Grand River, one at Pensacola, one at Markham Ferry, and another at Fort Gibson, to be constructed by the United States. On May 22, 1946, before any construction had been begun by the plaintiff on a dam at Fort Gibson, the defendant began the construction of a dam at this site and completed it on June 15, 1950.

The Grand River is a non-navigable stream, but it is one of the tributaries of the Arkansas River, a navigable river. The Fort Gibson project was constructed by the defendant as an integral part of a comprehensive plan for the improvement and regulation of navigation, the control of floods, and the production of hydroelectric power on the Arkansas River and its tributaries.

The plaintiff sues the defendant for the taking of its property as a result of this project. It claims that the defendant must pay compensation for (1) its water power rights at the Fort Gibson unit, (2) its exclusive franchise to develop electric power and energy at the Fort Gibson unit, and (3) certain items of severance damages including storage and headwater benefits accruing to the Pensacola unit from the Fort Gibson unit; the cost and value of surveys, plans and specifications for the Fort Gibson unit; and the loss of the use and value of certain lands and rights-of-way theretofore acquired for the inter-connection of the Fort Gibson unit with the plaintiff's system and for the distribution of electric power and energy from the Fort Gibson unit.

The right of a state to control and utilize the water of a non-navigable stream within its boundaries is subordinate to the right of the United States to control such waters to the fullest extent necessary to improve or regulate navigation on a navigable river to which the non-navigable stream is a tributary. There is no question as to the power of the Federal Government to do what it has done here. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508. The question before this court

is whether or not it must pay just compensation for any private property it has taken in carrying out its project.

The Commerce Clause of the Federal Constitution, Article I, Section 8, gives to the United States the power to improve and regulate navigable waters without any liability for damage to private property within the bed of the navigable stream, i.e., the lands below ordinary high-water mark, and water rights in navigable streams below high-water mark are inferior to and subject to this superior navigation easement and may be taken without compensation. *United States* v. *Willow River Power Co.*, 324 U.S. 499; *United States* v. *Chicago, Milwaukee, St. Paul, and Pacific Railroad Co.*, 312 U.S. 592; *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377; *United States* v. *Chandler-Dunbar Water Power Company*, 229 U.S. 53. Where Congress has appropriated the entire flow of a navigable river for a project designed to serve the interests of navigation although other purposes are also served, the owner of fast lands above the high-water mark of the stream has no compensable property rights in the flow of the navigable river. *United States* v. *Twin City Power Company*, 350 U.S. 222.

The United States also has the power to take private property on non-navigable streams which are tributary to navigable streams, and such Government action cannot be enjoined. *Oklahoma* v. *Atkinson Co.*, *supra*. In that case, the State of Oklahoma sought, without success, to enjoin the Federal Government from proceeding with the construction of the Denison Dam.

But if the Governmental action, under its power to regulate and improve navigable streams, results in the taking of private property located on a non-navigable stream which is a tributary of the navigable river, the United States must pay just compensation for the private property so taken. *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799; affirming 109 C. Cls. 555; *United States* v. *Cress*, 243 U.S. 316; *Iowa-Wisconsin Bridge Company* v. *United States*, 114 C. Cls. 464, cert. denied, 339 U.S. 982.

The question then becomes whether or not the plaintiff herein had property rights which have been taken by the United States. We are not faced with a situation involving water rights in the flow of a navigable stream as in *United*

*States* v. *Twin City Power Company*, *supra*. The State of Oklahoma owns the waters of the Grand River, a non-navigable stream, and the State conferred on the plaintiff all the rights which is possessed in the stream. Oklahoma does not follow the common law doctrine of riparian rights but follows instead the doctrine of prior appropriation for beneficial use or the so-called "Arid States Doctrine." Under this doctrine, the water running in a natural stream is the property of the State. Oklahoma Code, Title 60, Section 60 and Title 82, Section 1, O.S. 1951; *Murphy* v. *Kerr*, 296 Fed. 536. The property taken in the *Cress* and *Kansas City Life Ins. Co.* cases, cited above, was the impairment of the value of land in and adjacent to a non-navigable stream. In the *Kelly* case, reported with the *Cress* decision, the property right which was taken and for which compensation had to be paid was the right to the natural flow-off of the water in the non-navigable stream. *Cf. Willow River Power Company*, *supra*, where the Supreme Court said there was not the same right to have the navigable St. Croix flow tail waters away at natural levels that there was in *Kelly* to have the non-navigable stream run off his tail waters at natural levels. Water rights are a property interest which if taken by the United States must be paid for. *International Paper Company* v. *United States*, 282 U.S. 399. We believe the same rule should apply to the instant case, and that the plaintiff's vested water rights on a non-navigable stream were property rights which could not be taken without just compensation.

The other items of property which the plaintiff claims have been taken by the United States include its franchise to develop and generate electric power and energy at the Fort Gibson site, and certain items of severance damage. A license or franchise is a property right for the taking of which compensation must be paid. *International Paper Company* v. *United States*, *supra*; *Frost* v. *Corporation Commission*, 278 U.S. 515; *Jackson* v. *United States*, 122 C. Cls. 197; *United States* v. *Smoot Sand & Gravel Co., Inc.*, 248 F. 2d 822. *Cf. Southern Counties Gas Co.* v. *United States*, No. 483–54, decided January 15, 1958, in which this court found that the actions of the United States had made the franchise less valuable but did not amount to a taking of the franchise.

As to the items of severance damages, we believe that these were in the nature of indirect or consequential damages and therefore not compensable. *Mitchell* v. *United States*, 267 U.S. 341; *Omnia Commercial Company* v. *United States*, 261 U.S. 502.

The Government's primary defense to this lawsuit was that the plaintiff did not have any private property rights which could be the subject of a taking by the United States. We have answered that contention above. The Government has raised certain other defenses which we have considered and have rejected. The Government's suggestion of an estoppel from certain meetings, letters, etc., seems to us to have no basis. The Government, of course, had the right to take the plaintiff's property, and the only question before this court is the question of whether it could take it without compensation. The Government also urges that the present claim will be "released" by payment to and acceptance by the plaintiff of $6,500,000 authorized but so far as we know not appropriated by an Act of Congress. There is a question as to whether that authorization applied to this action at all or related solely to the Markham Ferry project. In any event, the appropriation, including the conditions, is, of course, a unilateral action on the part of the United States and cannot bind the plaintiff, unless it gets the money and thereby or otherwise releases its rights.

The plaintiff is entitled to recover just compensation for the taking of its water rights and its franchise. The amount of recovery will be determined in further proceedings pursuant to Rule 38(c).

It is so ordered.

LITTLETON, *Judge* (*Ret.*) and LARAMORE, *Judge*, concur.

WHITAKER, *Judge*, dissenting:

The vice in the opinion of the majority stems from the concept embraced in this sentence from its opinion: "The State of Oklahoma *owns* the waters of the Grand River, a nonnavigable stream * * *." The State of Oklahoma did not "own" the waters of the stream; it merely had the right to regulate and control the use of them for the benefit of its citizens. "Ownership" by the state is a concept repugnant to the American theory of government; it is "contrary to

the genius of a free government." Under the American system of government, natural resources belong, not to the state, but to the people. The state is not the overlord, doling out privileges to his underlings; it is the servant of the people, chosen by them to administer their common resources for the benefit of all, according to their respective rights. Its sole right is that of regulation and control.

But this right of one of the states of the Union is subject to the superior right of the United States to regulate and control the waters of the river, in the interest of navigation and purposes related thereto. Because the United States had this superior right, it is not liable for the actions complained of.

That, in the opinion of the Chief Judge and me, is the essence of the case. If we are correct in our premise, there has been no taking of private property for public use for which the Fifth Amendment requires the payment of just compensation. Plaintiff, the state's agent, of course has no greater right than its creator, the State of Oklahoma.

The issue presented is a clash in the exercise of the powers of two sovereignties—on the one hand, the power of the Federal Government, under the Commerce Clause of the Constitution, to use and control the waters of a non-navigable tributary of a navigable stream, in the interest of navigation on the navigable stream; and, on the other hand, the power of a state to use and control those waters for irrigation, the production of power or otherwise, in the interest of its citizens. If the powers of the Federal Government extend to the right of regulation and control of the waters of a non-navigable tributary of a navigable stream to the extent necessary to control and improve navigation on the navigable stream, its power to do so supersedes the power of the state to use and control the waters of this stream.

That the powers of the Federal Government do extend to the control and use of the waters of a non-navigable stream for the improvement of navigation on a navigable stream to which it is tributary is settled by *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 523. Wherever this power comes in conflict with state power, the state power must yield. It was so held in *Oklahoma* v. *Atkinson Co.*, *supra*. It had been so held long before in *United States* v. *Rio Grande Irrigation*

*Co.*, 174 U.S. 690. In that case the state sought to use the waters of the Rio Grande, far above the point where it was navigable, for irrigation, and had given the respondent the right to do so. The Supreme Court said the United States might enjoin such a use because it would interfere with the navigability of the river down stream. The Court said that the power of New Mexico to use those waters was "limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States." (Page 703.)

In *Florida* v. *Mellon*, 273 U.S. 12, 17, it was said: "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield," citing a number of cases.

In *Oklahoma* v. *Atkinson Co.*, *supra*, the Federal Government had let a contract to respondent to erect a dam on the Red River some 500 miles above the point where it was navigable. Oklahoma sought to enjoin the erection of the dam, insisting that it was beyond the constitutional power of Congress to build it, and that the building of it would interfere with the state's own program for water development. In answer to the latter contention, the Supreme Court in an unanimous decision said, at pages 534–535:

> And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress. *United States* v. *Rio Grande Dam & Irrigation Co.*, *supra*, p. 703; *New Jersey* v. *Sargent*, 269 U.S. 328, 337; *Arizona* v. *California*, 298 U.S. 558, 569; *United States* v. *Appalachian Power Co.*, *supra*.

This is in harmony with the purpose declared by Congress in the Federal Power Act, 49 Stat. 846, to assume priority in the control of such waters. In section 23(b) of this Act, it is prohibited that any dam should be constructed by any "person, association, corporation, state, or municipality" on such a non-navigable stream until it receives a license from the Federal Power Commission. The validity of this Act, as so construed, was sustained by the Supreme Court in *United States* v. *Appalachian Power Co.*, 311 U.S. 377.

When the Federal Government ousts the state government and takes control over the waters of the river, it has taken no property right of the Grand River Dam Authority, an agency of the State of Oklahoma; it has merely exercised its right to erect a dam at this place, which was superior to the right of the State of Oklahoma to do so, and, hence, superior to the right of its agency to do so. In doing so, it did not take private property for public use for which it is required by the Constitution to pay just compensation.

When it decided to erect the dam the Federal Government did take certain lands, rights-of-way, and other easements that had been acquired by the Authority, but these have been paid for. The only thing that has not been paid for is the exclusion of Oklahoma and its agent from control and use of the waters of this river. The Federal Government having a superior right to use and control them, it does not have to pay the holder of a subordinate right for its exercise.

This necessarily follows from the holding in *United States v. Rio Grande Irrigation Co., supra.* As stated previously, that company undertook to appropriate all the unappropriated waters of the Rio Grande River in the State of New Mexico, in which state the Rio Grande River was non-navigable, but the Supreme Court held that the United States was entitled to an injunction to prevent this. If the United States may enjoin the appropriation of waters by a corporation authorized by a state to do so, the United States certainly does not have to pay the corporation for the deprivation of that right.

That case, if authority were needed, would seem to dispose of plaintiff's claim for compensation for the taking of its right to erect a dam at this place and, by so doing, to utilize the water power of the river.

The majority comes to a different conclusion because they start with a false premise, that this was a taking of private property for public use.

JONES, *Chief Judge*, joins in the foregoing dissenting opinion.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and argument of counsel, makes findings of fact as follows:

1. The Grand River rises in Morris County, Kansas. It flows in a southeasterly direction to the vicinity of Wyandotte, Oklahoma, and then in a southerly direction until it joins the Arkansas River at a point not far from Muskogee, Oklahoma. The stream is known as the Neosho River in Kansas and as the Grand River in Oklahoma. (The Oklahoma designation will be used in the findings of fact, since this case involves an agency of the State of Oklahoma.) The Grand River is approximately 460 miles long and drains a total area of about 12,660 square miles. The principal towns in the watershed of the Grand River and its tributaries are Pittsburg, Parsons, Emporia, and Chanute in Kansas, Joplin and Neosho in Missouri, Miami and Vinita in Oklahoma, and Bentonville in Arkansas.

2. (a) The Grand River is a nonnavigable stream.

(b) The Arkansas River, of which the Grand River is a tributary, is a navigable stream.

3. The first extensive studies on the feasibility of developing the lower Grand River for flood control and hydroelectric power purposes were completed in 1932 by the Army Corps of Engineers, an agency of the defendant. Possible dam and reservoir sites at Pensacola, Markham Ferry, and Fort Gibson on the Grand River were considered. A report relative to these studies was published in 1935 as House Document No. 308, 74th Congress, 1st Session. The report concluded that Federal development of the lower reaches of the Grand River was not economically justified at that time.

4. On April 26, 1935, the State of Oklahoma enacted legislation (Session Laws of Oklahoma, 1935, Ch. 70, Art. 4, p. 350 *et seq.*) creating the Grand River Dam Authority (the plaintiff in this action) for the development of hydroelectric

power on the Grand River.[1] The following statutory language was used in establishing the plaintiff:

> There is hereby created within the State of Oklahoma a conservation and reclamation district to be Known as "Grand River Dam Authority" (hereinafter called the District), and consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Nowata, Ottawa, Rogers, Tulsa, Wagoner, Sequoyah, Osage, Washington, McIntosh, Creek, and Okmulgee. Such District shall be, and is hereby, declared to be a governmental agency and body politic and corporate, with the powers of government and with the authority to exercise the rights, privileges, and functions hereinafter specified, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries for irrigation, power and other useful purposes, the reclamation and irrigation of arid, semi-arid, and other lands needing irrigation, and the conservation and development of the forests, water and hydro-electric power of the State of Oklahoma.

5. Among the powers, rights, and privileges conferred upon the plaintiff by the legislation creating it were the following:

> (a) To control, store and preserve, within the boundaries of the District, the water of Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;
>
> (b) To develop and generate water power and electric energy within the boundaries of the District;
>
> * * * * * *
>
> (e) To acquire by purchase, lease, gift, or in any other manner, and to maintain, use and operate any and all property of any Kind, real, personal, or mixed, or any interest therein, within or without the boundaries of the District, necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act;
>
> (f) To acquire by condemnation any and all property of any Kind, real, personal, or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the powers,

[1] The statutory provisions quoted in findings 4 and 5 relative to the establishment and functions of the plaintiff have been amended in a number of respects since 1935. However, none of these amendments is especially significant from the standpoint of the present litigation.

"rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation;

* * * * *

(i) To construct, extend, improve, maintain, and reconstruct, to cause to be constructed, extended, improved, maintained, and reconstructed, and to use and operate any and all facilities of any kind necessary or convenient to the exercise of such powers, rights, privileges and functions;

* * * * *

(o) To borrow money for its corporate purposes and, without limitation of the generality of the foregoing to borrow money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with any such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require; and to make and issue its negotiable bonds for moneys borrowed * * *.

**6.** Following its establishment in 1935, the plaintiff undertook the preparation of a comprehensive plan for the storage and control of the waters of the Grand River and its tributaries within the State of Oklahoma in order to make beneficial use of such waters for the development and generation of electric power and energy. By 1939, the plaintiff had developed a plan which contemplated the construction, maintenance, and operation by the plaintiff of three dam-and-reservoir projects on the Grand River, with hydroelectric generating units at the several projects. All were to constitute a single system functioning under unified control. The first of these projects was to be constructed at Pensacola, the second downstream from Pensacola at Markham Ferry, and the third downstream from Markham Ferry at Fort Gibson. Under the plan, the Pensacola project was to provide the principal headwater and power storage, while the installations at Markham Ferry and Fort Gibson were to be "run of the river" plants. The plan contemplated that the water stored at Pensacola would be used three times for the generation of electric power and energy—first through the Pensacola unit, second through the Markham Ferry unit, and then through the Fort Gibson unit.

7. (a) While the preparation by the plaintiff of its comprehensive plan for the development of the water-power resources of the Grand River was in progress, further consideration was being given to the feasibility of a Federal development in that stream. Pursuant to a declaration of policy by the Congress in 1936, the Corps of Engineers conducted an investigation to determine the advisability of the construction by the defendant of three dams along the Grand River at Pensacola, Markham Ferry, and Fort Gibson. After public notice, a public hearing was held at Vinita, Oklahoma, on June 7, 1937. That meeting was called by the Corps of Engineers and was attended by various interested corporations, associations, private citizens, and officials of the State of Oklahoma and its agencies, including representatives of the plaintiff.

(b) At the hearing on June 7, 1937 mentioned in paragraph (a) of this finding, proposals for the construction by the defendant of three dams on the Grand River at Pensacola, Markham Ferry, and Fort Gibson were explained by representatives of the War Department.

(c) There was submitted at the hearing on June 7, 1937 a copy of a lengthy letter dated June 4, 1937 from the Director of the Division of Water Resources, Oklahoma Planning and Resources Board, an agency of the State of Oklahoma, to the District Office of the Corps of Engineers at Memphis, Tennessee, recommending the construction by the defendant of the three proposed projects at Pensacola, Markham Ferry, and Fort Gibson.

(d) At the hearing on June 7, 1937, the Chairman of the plaintiff's Board of Directors read and filed a statement which declared (among other things) that:

> The Grand River Dam Authority is ready to assume its responsibility. With the power given it by the Oklahoma State Legislature we can and will issue bonds to carry out the part of the program as required by the United States Government.
>
> a. Provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the projects, i. e., Pensacola, Marken [sic] Ferry, and Ft. Gibson Dams.
>
> b. Hold and save the United States free from damages due to the construction works; to pay for all alterations to bridges, highways, railroads, pipelines,

telephone and telegraph lines, and alterations to other existing improvements made necessary as a result of the construction.

c. Maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of War.

In so many words the Grand River Authority with its power to issue 15 million dollars worth of bonds, is ready at all times to cooperate with the government in construction of these dams. We can meet any requirement you make upon us. Gentlemen, we are Rarin' to go, lets build the Grand River Dams.

(e) In a report which was published in 1939 as House Document No. 107, 76th Congress, 1st Session, the Corps of Engineers recommended the construction and operation by the defendant of three dam-and-reservoir projects on the Grand River at Pensacola, Markham Ferry, and Fort Gibson. It was proposed in the report that the three projects be operated as one coordinated system in the combined interest of flood control and power development.

8. (a) In the meantime, the plaintiff began the construction of its contemplated dam and reservoir at Pensacola in 1938. The construction of this project by the plaintiff was financed by the Public Works Administration, an agency of the defendant, which made a grant to the plaintiff in the amount of $8,500,000 and a loan to the plaintiff in the amount of $11,500,000.

(b) On May 12, 1939, the plaintiff was authorized by the Oklahoma State Legislature to issue bonds in the aggregate amount of $10,000,000 for the construction of the plaintiff's proposed projects at Markham Ferry and Fort Gibson.

(c) On July 26, 1939, the plaintiff obtained from the Federal Power Commission, an agency of the defendant, a license (No. 1494) for the operation of its Pensacola project. This license contained the following provisions (among others):

*Article 1.* This license is issued for a period of fifty (50) years from January 1, 1939, and in consideration hereof and the benefits and advantages accruing hereunder to the Licensee, it is expressly agreed by the Licensee that the entire project, project area, and project works, as hereinafter designated and described,

whether or not located in, on, or along said Grand River or upon reservations of the United States, shall be subject to all the terms and conditions of this license.

* * * * *

*Article 13.* The Licensee is hereby authorized to operate the reservoir in such manner as to utilize storage space below elevation 745 for power production purposes but not to utilize any storage space above said elevation 745 for power production purposes except during periods when the reservoir is being operated for the control of floods. The storage capacity between elevations 745 and 755 shall be expressly reserved for the control of floods. The Licensee shall impound flood waters in the storage space between elevations 745 and 755, and release flood waters therefrom, when, as, and in the manner directed by the Secretary of War, or his authorized representative: provided, that the Licensee shall not be required to impound any water above elevation 750 until the United States has acquired the necessary flowage rights above that elevation.

*Article 14.* Subject to the provisions of Article 13, the operation of the project by the Licensee, so far as such operation may affect the use, storage, and discharge from storage, of waters, shall at all times be subject to the control of the Secretary of War under such rules and regulations as he may prescribe in the interests of navigation and flood control, and subject to the control of the Commission under such rules and regulations as it may prescribe for the safety of the dam and for the protection of life, health, and property.

* * * * *

*Article 20.* The Licensee shall interpose no objections to nor in any way prevent the use of water for domestic purposes by persons or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works.

* * * * *

*Article 26.* * * * The Licensee further agrees, on behalf of itself, its successors and assigns, that, in the event the project is taken over by the United States upon the termination of this license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, it will be responsible for and will make good any defect of title to or of right of user in any such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and dis-

charge or will assume responsibility for payment and discharge of all liens or incumbrances upon the project or project property created by said Licensee or created or incurred after the issuance of this license * * * .

(d) The plaintiff completed the construction of its Pensacola project in 1940. When completed, the project had a storage capacity of approximately 1,680,000 acre-feet at a maximum power-pool elevation of 745 feet above mean sea level, additional storage for flood control of approximately 520,000 acre-feet at elevation 755 above mean sea level, and a hydroelectric power plant with an initial installation of 80,000 kilowatts (which has since been increased to 90,000 kilowatts).

(e) During the period 1939-1940, the plaintiff acquired lands, easements, and rights-of-way, and constructed transmission lines, substations, and facilities, for the connection and integration of its Pensacola project with its contemplated Markham Ferry and Fort Gibson units. The plaintiff also had surveys, plans, and specifications made for the construction of its proposed Markham Ferry and Fort Gibson units.

9. On June 24, 1941, the Secretary of War, in pursuance of the authority conferred on him by Articles 13 and 14 of the license issued by the Federal Power Commission in connection with the plaintiff's Pensacola project (see finding 8 (c)), approved the following regulations to govern the operation of that project in the interest of flood control:

1. Whenever the elevation of the reservoir exceeds elevation 745, the discharge facilities shall be operated so as (a) to reduce as much as practicable the flood damage below the reservoir and (b) to limit the elevation of the reservoir to elevation 750.

2. The District Engineer, Engineer Department at Large, in charge of the locality shall advise the [Grand River Dam] Authority when inflow rates are anticipated which may raise the elevation of the pool above elevation 745, and the maximum rate of release allowable. The Authority shall then take such measures to increase the storage capacity of the reservoir available for the control of floods as are not inconsistent with the development of power.

3. The Authority shall inform the District Engineer daily, promptly after taking the morning observations, as to the elevation of the reservoir pool and the tail

water, and the rates of release for the preceding 24 hours. Whenever the pool is above elevation 745 the Authority shall submit these reports by telegraph or telephone as directed by the District Engineer, supplemented by such additional telegraphic or telephonic reports as may be required by the District Engineer in the interest of flood control.

10. In the Flood Control Act of August 18, 1941 (55 Stat. 638, 645), Congress (among other things) modified a previously approved comprehensive plan for flood control and other purposes in the Arkansas River Basin by incorporating in the plan the three dam-and-reservoir projects on the Grand River at Pensacola, Markham Ferry, and Fort Gibson recommended by the Corps of Engineers in 1939 (see finding 7 (e)). The appropriation of funds for the construction of such works (among others) was authorized.

11. On November 21, 1941, the defendant took possession of the plaintiff's Pensacola project in accordance with the provisions of Executive Order 8944 (6 F. R. 5947). Thereafter, the project was operated by the defendant for national defense purposes until September 1, 1946, when it was returned to the plaintiff by the defendant.

12. (a) While the plaintiff's Pensacola project was being operated by the defendant for national defense purposes, plans were set in motion for the construction by the defendant of a dam and reservoir on the Grand River at Fort Gibson, in accordance with the congressional authorization mentioned in finding 10. A public hearing to consider the project was called and held by the Corps of Engineers at Muskogee, Oklahoma, on January 27, 1942.

(b) The Director of the Oklahoma Planning and Resources Board appeared at the hearing on January 27, 1942 and, on behalf of the Board, endorsed the proposal for the construction of a dam and reservoir at Fort Gibson by the defendant.

(c) Delay in the formulation of definite plans for the construction by the defendant of a dam-and-reservoir project at Fort Gibson was encountered because of the shortage of construction materials during World War II.

13. (a) In a letter dated December 24, 1943 and addressed to the War Department, the plaintiff stated that it desired that its property interest in the waters of the Grand River

be duly recognized in connection with the proposed construction of a Federal dam-and-reservoir project at Fort Gibson, and that it be paid just compensation for any appropriation of its water rights.

(b) In a reply dated January 6, 1944, the Chief of Engineers stated in part as follows:

> * * * I am pleased to assure you that if and when the Fort Gibson project is constructed, the property owners affected will be paid just compensation for property taken, within the meaning of the Federal Constitution. However, this office does not consider that the action of the Oklahoma legislature in providing for the future development of the Fort Gibson site by the Grand River Dam Authority had the effect of creating property for which compensation must be paid by the Federal Government.

**14.** (a) In a letter dated September 25, 1945 from the Governor of Oklahoma to the Chief of Engineers, it was stated (among other things) as follows:

> Acting for the State of Oklahoma and in compliance with the requirements of Public Law 534 of the Seventy-eighth Congress, second session, I am pleased to approve the plans submitted for the comprehensive development of the Arkansas River in this State, subject, as you also recommend, to such modification as later study may find desirable.
>
> The engineering and economic record of this report is complete and voluminous. I quite agree with your opinion that public benefits, especially from navigation, will greatly exceed the estimates of the report.
>
> I congratulate you upon the part you have played in developing this program and thank you for expediting its approval. It indicates a most worth-while development of the Arkansas Basin and forecasts prosperity and happiness for our people. I am unable to find words with which to express my commendation for your able and progressive leadership before and during the war in originating and developing this program * * *.

(b) The comprehensive plan mentioned in the letter of September 25, 1945 from the Governor of Oklahoma included the proposed construction by the defendant of a dam and reservoir at Fort Gibson on the Grand River.

**15.** (a) A letter was written by the plaintiff to the Chief of Engineers on February 14, 1946 relative to the anticipated

issuance by the Corps of Engineers of an invitation for bids on the construction of the Federal dam and reservoir at Fort Gibson. This letter stated (among other things) that:

> The Authority now wishes to call your attention to the fact that the construction of this project by the Federal Government will not only take and appropriate the Authority's water rights in Grand River but will appropriate and take other properties and rights of the Authority.

The letter further stated that the construction of the dam and reservoir at the Fort Gibson site by the Corps of Engineers would affect the property and rights of the plaintiff as follows:

> 1. The appropriation of lands, rights of way, easements, transmission lines and facilities, which the Authority has rightfully acquired and constructed for the purpose of connecting the Pensacola unit with the Markham's Ferry and Fort Gibson units.
>
> 2. The appropriation and making beneficial use of the waters of Grand River for the generation, distribution and sale of hydroelectric power and energy to the exclusion of the Authority.
>
> 3. The taking and converting to the Government's benefit of the vested property rights of the Authority in the Fort Gibson unit which were created by the construction and operation of the Pensacola dam and reservoir (head-water improvement), thereby preventing the Authority from utilizing said head-water benefits created by the Pensacola unit.
>
> 4. The taking of the Authority's right and franchise to develop, generate, distribute and sell electricity and electric energy at the Fort Gibson unit.

(b) In a reply dated March 11, 1946 to the letter of February 14, 1946 from the plaintiff, the Chief of Engineers stated (among other things) that he did not believe that it would be necessary for the defendant to pay compensation for the intangible rights claimed by the plaintiff in its letter. The Chief of Engineers further stated, however, that the obligation of the defendant to pay just compensation for any physical property of the plaintiff which might actually be taken for the proposed Fort Gibson project of the defendant was recognized.

16. Thereafter, construction of a dam-and-reservoir project

at Fort Gibson on the Grand River was begun by the Corps of Engineers on May 22, 1946, and was completed on June 15, 1950. Construction of a power house at the project was completed on June 30, 1953.

17. The Fort Gibson project was constructed by the defendant as an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of hydroelectric power on the Arkansas River, a navigable waterway, and its tributaries. The project has been operated to carry out these purposes.

18. (a) The defendant's Fort Gibson dam is located on the Grand River at a point approximately 50 miles below the plaintiff's Pensacola project, and near the site of the plaintiff's contemplated Fort Gibson dam. It has at present an installed generating capacity of approximately 49,000 kilowatts, with provision to add additional generating capacity of 25,000 kilowatts in the future. The bottom of the power pool is at elevation 551 above mean sea level, and the top of the power pool is at elevation 554 above mean sea level. There is storage capacity between elevation 554 and elevation 582 that is reserved for the control of flood waters.

(b) The defendant's Fort Gibson project is a "run of the river" project; i. e., its reservoir provides pondage sufficient for fluctuations of inflow only over short periods of time, with a maximum drawdown of not more than three feet. There is sufficient pondage, based on all flows out of the plaintiff's Pensacola project, to produce 9,000 kilowatts of continuous power for only 13 days. The production of power at Fort Gibson is dependent upon releases of water from the plaintiff's Pensacola project.

19. (a) During the course of the construction by the defendant of its Fort Gibson project, a suit was instituted by the defendant in the United States District Court for the Northern District of Oklahoma [1] to condemn certain lands for use in connection with the project. Among the lands which the defendant was attempting to acquire by condemnation in that proceeding was a 70-acre tract belonging to the plaintiff. The plaintiff appeared in the

[1] The style of the condemnation suit was United States v. 1,031.15 acres of land, more or less, situate in Mayes County, Oklahoma, and Ray Bonnella, Grand River Dam Authority, et al. (No. 2116–Civil).

condemnation proceeding and took the position that the Secretary of War, at whose request the suit had been instituted, lacked the authority to condemn its land. The court held against the plaintiff on this issue. Thereafter, the plaintiff filed with the court an application for a distribution of compensation with respect to the land in question.

(b) It became necessary for the defendant, in connection with the development of its Fort Gibson project, to acquire flowage rights over certain lands owned by the plaintiff, and to provide for the relocation of a transmission line operated by the plaintiff. An agreement providing for the conveyance by the plaintiff of flowage easements to the defendant, and the relocation of the plaintiff's transmission line, was entered into between the defendant and the plaintiff on February 6, 1950. Under the agreement, the defendant paid to the plaintiff the sum of $210,140.80.

20. (a) In April 1954, the plaintiff sought to institute before the Federal Power Commission a proceeding against the defendant, the Secretary of the Army, and the Secretary of the Interior relative to the defendant's Fort Gibson project. In its petition, the plaintiff alleged (among other things) that the defendant's Fort Gibson project, without the use and aid of the storage and headwater improvements of the plaintiff's Pensacola project, was incapable of producing any firm electric power and energy; that through the use of the plaintiff's storage and headwater improvements at the Pensacola project, the defendant was able to produce at its Fort Gibson project approximately 94,600,000 kwh of firm energy per year; and that since about May 1, 1953, the defendant had been operating its Fort Gibson project and had been making use of the plaintiff's water storage and headwater improvements for the production and generation of electric power and energy, but had not paid or offered to pay to the plaintiff any compensation on account of such benefits. The plaintiff requested the Commission (among other things) to:

> * * * make and enter an Order determining and fixing the reasonable and equitable annual charges to be paid to the licensee by the United States for the benefits accruing to the Fort Gibson Power Project from the li-

censee's storage and headwater improvements at its Pensacola Project * * * .

(b) In a letter dated June 11, 1954 from the Secretary of the Federal Power Commission to the plaintiff, it was stated (among other things) as follows:

> Section 10 (f) of the Federal Power Act does not provide for the assessment of headwater benefit charges to projects constructed and operated by the Federal government. Your petition is therefore not acceptable for filing and is returned herewith.

(c) Thereafter, the plaintiff sought and obtained a review by the United States Court of Appeals for the Tenth Circuit of the action of the Federal Power Commission in rejecting the petition mentioned in this finding. In a decision dated July 12, 1957 (246 F. 2d 453), the Court of Appeals upheld the Commission's action. Among other things, the court said (at p. 455) that Section 10 (f) of the Federal Power Act, as amended:

> * * * does not vest in the Commission power or authority to assess charges against the Fort Gibson project for benefits received from the headwater facilities at the Pensacola site. The subsection makes specific reference to the United States as one entitled under certain circumstances to receive compensation for headwater benefits. But no specific reference is made to the United States as one liable for the payment of compensation for benefits of that kind. In view of the specific reference to the United States in one instance and the absence of any specific reference to it in the other, there is no basis upon which it can be inferred or implied that Congress intended or purposed to include the United States among the owners of non-licensed projects liable for payment of compensation for upstream benefits. * * *

(d) The plaintiff did not apply to the Supreme Court for a writ of certiorari in connection with the decision of the United States Court of Appeals for the Tenth Circuit mentioned in paragraph (c) of this finding. Therefore, the judgment of the Court of Appeals is a final judgment.

**21.** (a) While the various events mentioned in findings 12–20 relative to the defendant's Fort Gibson project were transpiring, the plaintiff was endeavoring to proceed with

the construction of its proposed project at Markham Ferry on the Grand River.

(b) On August 9, 1946, the plaintiff filed with the Federal Power Commission an application for a preliminary permit under the Federal Power Act for a proposed hydroelectric development at Markham Ferry.

(c) By an order dated January 18, 1949, the Federal Power Commission dismissed the plaintiff's application referred to in paragraph (b) of this finding. The reason given by the Commission for such action was that the Congress had authorized the construction of a Federal project at Markham Ferry (see finding 10).

(d) In the act of July 6, 1954 (68 Stat. 450), Congress further modified the comprehensive plan for the development of the water resources of the Arkansas River Basin, as previously approved and modified (see finding 10), so as to authorize the construction of the Markham Ferry project on the Grand River by the plaintiff. The act also authorized the appropriation of not to exceed $6,500,000 as a monetary contribution by the defendant for flood control storage in the Markam Ferry project, and then provided (among other things):

> * * * That the acceptance by the Grand River Dam Authority of the foregoing amount shall constitute the agreement of the Grand River Dam Authority to hold and save the United States free and harmless from all claims heretofore or hereafter asserted of whatever nature including but not limited to acquisition of land, relocation, construction, operation and maintenance of the dam and reservoir * * *.

(e) By a letter dated August 12, 1954, the plaintiff again requested the Federal Power Commission to issue a license to it for the Markham Ferry project.

(f) In a letter dated August 19, 1954 and addressed to the Corps of Engineers, the plaintiff requested that there be placed in the Federal budget for the ensuing fiscal year an item calling for the appropriation of the $6,500,000 authorized in the act of July 6, 1954. The evidence does not show whether this sum has ever been appropriated by the Congress and made available to the plaintiff.

(g) On June 22, 1955, the Federal Power Commission issued an order granting to the plaintiff a license (No. 2183) for the construction and operation of the Markham Ferry project.

22. (a) Among the terms and conditions of the license that was issued to the plaintiff by the Federal Power Commission for the Markham Ferry project were the following:

> *Article 12.* The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army. Such rules and regulations may include the construction, maintenance, and operation by the Licensee, at its own expense, of such lights and signals as may be directed by the Secretary of the Army.
>
> *Article 13.* The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee so far as they affect the use, storage, and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.
>
> * * * * * *
>
> *Article 17.* * * * In the event the project is taken over by the United States upon the termination of the license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, the Licensee, its successors and

assigns will be responsible for and will make good any defect of title to or of right of user in any of such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge, or will assume responsibility for payment and discharge, of all liens or incumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license * * *.

(b) Article 12 was deleted by an order of the Commission issued on December 13, 1954.

(c) Article 13 was amended by an order issued by the Commission on December 13, 1954, and was amended again by an order issued by the Commission on March 22, 1957. As amended the second time, Article 13 reads as follows:

The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they effect the use, storage and discharge from storage of waters above the dead storage pool (dead storage pool being that portion of the pool which is not used for operational purposes), shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation and flood control, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir above the dead storage pool at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation or flood control, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

23. The Board of Directors of the plaintiff has never granted to the defendant, or to any department or agency thereof, any franchise, right, or privilege to develop and generate electric power and energy on the Grand River in Oklahoma, or any right, title, or interest in and to the waters of the Grand River for the production of electric power and energy, or any right to control, supervise, conserve, and de-

velop the water power at the Fort Gibson dam-and-reservoir project.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, together with interest thereon, as part of just compensation and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38(c).

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No. 503

# In the Supreme Court of the United States

October Term, 1959.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

GRAND RIVER DAM AUTHORITY, *Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF CLAIMS.

Q. B. BOYDSTUN,
P. O. Drawer 112,
Vinita, Oklahoma,
*General Counsel for Respondent.*

Wright Building — GUYETTE — ATKINS — Tulsa, Oklahoma

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# In The
# Supreme Court of The United States

No. 303

UNITED STATES OF AMERICA, *Petitioner,*

vs.

GRAND RIVER DAM AUTHORITY, *Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF CLAIMS.

Comes now the respondent, Grand River Dam Authority, and submits the following brief in opposition to the petition for writ of certiorari to review the judgment of the United States Court of Claims entered in the above case on July 15, 1959. (175 Fed. Supp. 153).

### Question Presented.

Whether vested water rights and franchise rights in a non-navigable stream acquired under state law can be taken or destroyed by the United States in the exercise of its powers under the Commerce Clause of the Federal Constitution (Art. I, Sec. 8, Clause 3) without compensation.

**Statement.**

In order to correct the inaccuracies and omissions in the petitioner's statement, we deem it advisable to make this statement.

The Corps of Engineers of the United States Army completed a feasibility study of Grand River in 1932. A report of these studies was published as House Document 308, 74th Congress, First Session (Pl. Ex. 12).

The study and report concluded that there was no federal interest in the development of Grand River for any public purpose, and at page 1261 of the report stated:

> "That there is no present or prospective income to be had from reservoir waters for public or private use other than that to be obtained from construction of power and water supply reservoirs, which should be developed by private capitals."

Following this study and report, the State of Oklahoma, by legislative enactment, created the Grand River Dam Authority, a public corporation, for development of the hydro electric power on Grand River (Session Laws of Oklahoma 1935, Chap. 70, Art. 4, page 350, *et seq.*). Said Act vested in the Authority all of the water power rights in said river, together with the exclusive right and franchise to develop said waters for the production of electric power and energy and other beneficial purposes. (*City of Tulsa v. Grand Hydro, Dist. Court of Mayes County, Okla.* Pl. Ex. 1; *GRDA* v. *Grand Hydro,* 200 Okl. 157, 201 P. 2. 225; *GRDA* v. *Grand Hydro,* 335 U. S. 359 157, 201 P. 2d 225; *GRDA* v. *Grand Hydro,* 335 U. S. 359

The United States did not express any affirmative interest in the development of Grand River until the Flood Control Act of August 18, 1941. (55 Stat. 638-645)

The Authority completed the construction of the Pensacola unit and completed the plans for the Markham Ferry and Fort Gibson units, had acquired lands and rights-of-way and constructed transmission lines to interconnect the three units by 1940 and prior to the 1941 Flood Control Act.

The Authority, prior to said 1941 Flood Control Act, had issued revenue bonds in excess of $11,500,000.00, pledging as security for the payment of these bonds the revenues derived from it properties, including vested water rights and franchise rights in Grand River.

The licenses issued to the Authority for the Pensacola and Markham Ferry projects by the Federal Power Commission retained in the United States no control whatsoever in or over the power pools of these projects. The storage and discharge in the reservoirs above the power pools are under the direction of the Corps of Engineers, all of which was agreed to by the Authority before the licenses were issued.

None of the properties covered in the Authority's claim have been paid for by the United States. The Condemnation case covering the 70 acre tract referred to by petitioner is still pending in the United States District Court for the Northern District of Oklahoma. Certain transmission lines were relocated by agreement between the Authority and the Government; however, none of these properties are included in this lawsuit.

The petitioner refers to the claim that the Authority filed with the Federal Power Commission for headwater improvements. The Federal Power Commission ruled that it had no jurisdiction in the matter, which ruling was sustained by the Court of Appeals. (*GRDA* v. *Federal Power Commission*, 246 F. 2d 453, C. A. 10). However, that decision does not affect any of the matters in this lawsuit.

## ARGUMENT.

### Writ Should Not Be Granted.

**1. *Real Question or Issue.***

The petition for writ of certiorari does not correctly state the question in issue in this cause. The question as stated in said petition is based upon the erroneous assumptions that (1) Oklahoma is a public lands state, (2) the issue of title is to unappropriated waters of the State of Oklahoma, and (3) the State of Oklahoma is claiming compensable interest in the waters of Grand River. All of these assumptions are incorrect and are not substantiated by the record and law in this case.

**(a) Indian Territory Not Public Lands.**

Grand River, prior to the admission of Oklahoma as a state, was wholly located within the Indian Territory. No lands through which Grand River flowed were public lands.

The Territory of Oklahoma and the Indian Territory were admitted into the Union as the State of Oklahoma on equal footing with the original states. (Proclamation of Statehood, Nov. 16, 1907, No. 6869).

The Territory of Oklahoma, prior to statehood, adherred to the water law known as the "Arid States Doctrine". In the Indian Territory, the common law rule of water law applied.

The Constitution of Oklahoma (Schedule, Sec. 2) placed in force all laws in force in the Territory of Oklahoma at the time of admission of the two territories into

the Union. Therefore, upon statehood, the Arid States Doctrine was placed in force in that part of Oklahoma which was formerly Indian Territory.

Before the Indian Territory was admitted into the Union, the United States had released its right to control the waters of non-navigable streams in the Indian Territory for the development of electric power and energy and other purposes. Section 25 of an Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and other purposes, April 26, 1906, 34 Stat. 137, provides:

> "That any light or power company doing business within the limits of the Indian Territory * * * are hereby invested and empowered with the right of locating, constructing, owning, operating, using and maintaining canals, reservoirs * * * and a dam, or dams, across any *non-navigable* stream within the limits of said Indian Territory for the purpose of obtaining *a sufficient supply of water* to manufacture and *generate electric power or other power* * * * *provided, that all rights granted hereunder shall be subject to the control of the future territory or state within which the Indian Territory may be situated.*"

Under this Act, when the Indian Territory was admitted as a state, all of the water rights in non-navigable streams were placed under the control of the State of Oklahoma.

**(b) No Unappropriated Waters in Grand River.**

There were no unappropriated waters in Grand River at the time Congress approved (Flood Control Act of 1941) federal development of Grand River.

Under the Oklahoma Water Code, Chapter 1, Title 82, Oklahoma Statutes, all of the waters of Grand River had been appropriated and all of the water rights in Grand River had been established by a judicial decree. *Tulsa* v. *Grand Hydro, et al., Dist. Court of Mayes County, Oklahoma* (Pl. Ex. 1), which decree held:

> "* * * and the Court further finds and adjudges that the Act creating the Grand River Dam Authority is a legislative appropriation to the Grand River Dam Authority of all of the waters of the Grand River and its tributaries in Oklahoma."

This decree was entered in February, 1938. A certified copy of this decree was of record in the land offices of each county through which Grand River flowed.

**(c) State of Oklahoma Is Not Claiming Compensable Interest.**

The record in this case conclusively shows that the issue is not whether the State of Oklahoma has a compensable right in the waters of Grand River. The State does not have and does not claim any interest for the reason that it has parted with all of its interest and has conveyed and granted all of its rights in Grand River to the respondent, and the respondent is vested with all water power rights in said stream.

**2. *Petition Fails to State Reasons Sufficient for Granting of Writ.***

None of the reasons set out in petition are substantiated by the facts and the law in this case, and do not fall within the rules of this Court (Rule 19).

**(a) Waters of Grand River Owned by the State of Oklahoma in Trust.**

Oklahoma does not follow the common law doctrine of riparian rights but follows instead the doctrine of prior appropriation for beneficial use, or the so-called "Arid States Doctrine." Under this doctrine, the water running in a natural stream is the property of the state. Oklahoma Code, Title 60, Section 60; Title 82, Section 1, O. S. 1951, *Murphy* v. *Kerr,* 296 Fed. 536 (D. C. N. M. 1923):

> "Water running in a natural stream belongs to the public by a statutory enactment. The States of Arizona, Colorado, California, Montana, Nevada, New Mexico, *Oklahoma,* Oregon, North Dakota, South Dakota, Texas, Utah, Wyoming and Idaho have declared in substance that all waters within the state are the property of the public, or belonging to the state. The modern expression is that such waters are owned by the state in trust for the people * * *. While the corpus of natural water belongs to the state in trust for the public, the law recognizes a property right in its flow and use known as the usufructuary right or the water right. Wile in his works on water rights at page 304, Volume 1, 3rd Edition, gives two definitions of a water right as follows: 'A water right of appropriation is real estate independent of the ditch for carrying the water and independent of the ownership or possession of any land and independent of place of use or mode of enjoyment, whereby the appropriator is granted by the Government the exclusive use of the water anywhere so long as he applies it to any beneficial purpose and it is an incorporeal hereditament, solely usufructuary, not conferring ownership in the corpus of the water and the channel of the stream.
>
> "'A water right is a usufruct in the stream consisting in the right to have the water flow so that some

portion of it (which portion the law limits in various ways) may be reduced to possession and be made the private property of an individual.'

"It is therefore the right to divert water from a natural stream by artificial means and apply the same to beneficial use. Such a right is real estate."

The holding of this Court and the uniform holdings of other courts are that water rights are determined by state law. *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239, at page 252:

"Water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with the state law."

Also see *Rank* v. *Krug*, 90 Fed. Supp. 773; *Ickes* v. *Fox*, 300 U. S. 82.

The judgment of the Court of Claims is in harmony with these decisions, and not contrary to any decisions of this Court.

**(b) Respondent Is Vested With All Water Power Rights and Franchise to Develop the Same.**

The respondent is the owner and holder of all of the water power rights and franchise rights to develop the same in Grand River. Session Laws of Oklahoma 1935, Chap. 70, Art. 4, page 350, *et seq.*; *GRDA* v. *Grand Hydro*, 200 Okl. 157, 201 P. 2d 225; 335 U. S. 359 at 363.

The judgment of the Court of Claims is in harmony with these decisions and not contrary to any decisions of this Court.

**(c) Vested Water Rights Is Property.**

The vested water rights and franchise rights of the respondent is private property. *Ronzio* v. *Denver & R. G.*

*W. R. Co.*, 116 F. 2d 605; *Ickes* v. *Fox*, 300 U. S. 82; *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U. S. 239; *United States* v. *Appalachian Electric Power Co.*, 107 F. 2d 769.

The judgment of the Court of Claims is in harmony with these decisions and not contrary to any decisions of this Court.

**(d) Water Rights Are a Property Interest Which if Taken by the United States Must Be Paid For.**

The respondent's *vested* water rights in Grand River a non-navigable stream, are property rights which cannot be taken without just compensation. *International Paper Co.* v. *United States*, 282 U. S. 399; *United States* v. *Kansas City Life Insurance Co.*, 339 U. S. 799; *United States* v. *Cress*, 243 U. S. 316; *Iowa-Wisconsin Bridge Co.* v. *United States*, 114 C. Cls. 464, cert. denied, 339 U. S. 983.

The judgment of the Court of Claims is in harmony with these decisions and not contrary to any decisions of this Court.

**(e) Franchise Is Property.**

There is no dispute that the respondent holds the exclusive franchise from the State of Oklahoma to develop and generate electric power and energy at the Fort Gibson site. A license, or franchise, is a property right for the taking of which compensation must be paid. *International Paper Co.* v. *United States, supra; Frost* v. *Corporation Commission*, 278 U. S. 515; *Jackson* v. *United States*, 122 C. Cls. 197; *United States* v. *Smoot Sand & Gravel Co., Inc.*, 248 F. 2d 822.

The judgment of the Court of Claims is in harmony with these decisions and not contrary to any decisions of this Court.

**Summary.**

The undisputed facts and law in this case are:

1. That, under state and federal law, the State of Oklahoma has the power and right to control the non-navigable waters in the State of Oklahoma.
2. That the State of Oklahoma has the right to grant, convey and vest in others the exclusive right to make beneficial use of waters in non-navigable streams in Oklahoma.
3. That the State of Oklahoma vested in the respondent, Grand River Dam Authority, the exclusive right to develop the waters of Grand River for the production of electric power and energy.
4. That long before the taking by the Government, the respondent had made beneficial use of the waters of Grand River and had incurred bond obligations pledging the revenues from its properties, including these water rights, for the payment of said obligations.
5. That the construction of the Fort Gibson project by the United States took and destroyed the Authority's exclusive water power right and franchise right to develop electric power and energy from Grand River at the Fort Gibson site.

It cannot be doubted that Congress had the power to take over the development of Grand River for flood control and the production of electric power and energy in aid of navigation and supersede this plaintiff, but only subject to the limitations imposed by the Fifth Amendment of the Constitution by paying just compensation for property and *vested* property rights taken and destroyed in this non-navigable stream.

Under the petitioner's theory in this case, the Federal Government can take or destroy *vested* water rights and other property rights in the most remote rivulet and mountain stream without paying just compensation. It is common knowledge that (with a very few isolated exceptions) all rivulets, creeks and streams in the seventeen "arid states" (Oklahoma included) connect somewhere in their course to the ocean with a stream that is navigable.

If the petitioner's contention is correct, then the Federal Government can take or destroy every vested water right that is essential to sustain not only the life of most of our population but every vested water right that is vital to agriculture and industry without compensation. This would mean that the Federal Government could take and destroy water rights of great cities such as Oklahoma City, Tulsa and Muskogee, without paying just compensation. The cities named obtained their water rights under the Oklahoma Water Code, the same as this respondent.

We do not believe that it was ever the intention of the framers of our Constitution that our Government, under the Commerce Clause of the Constitution, could go out to

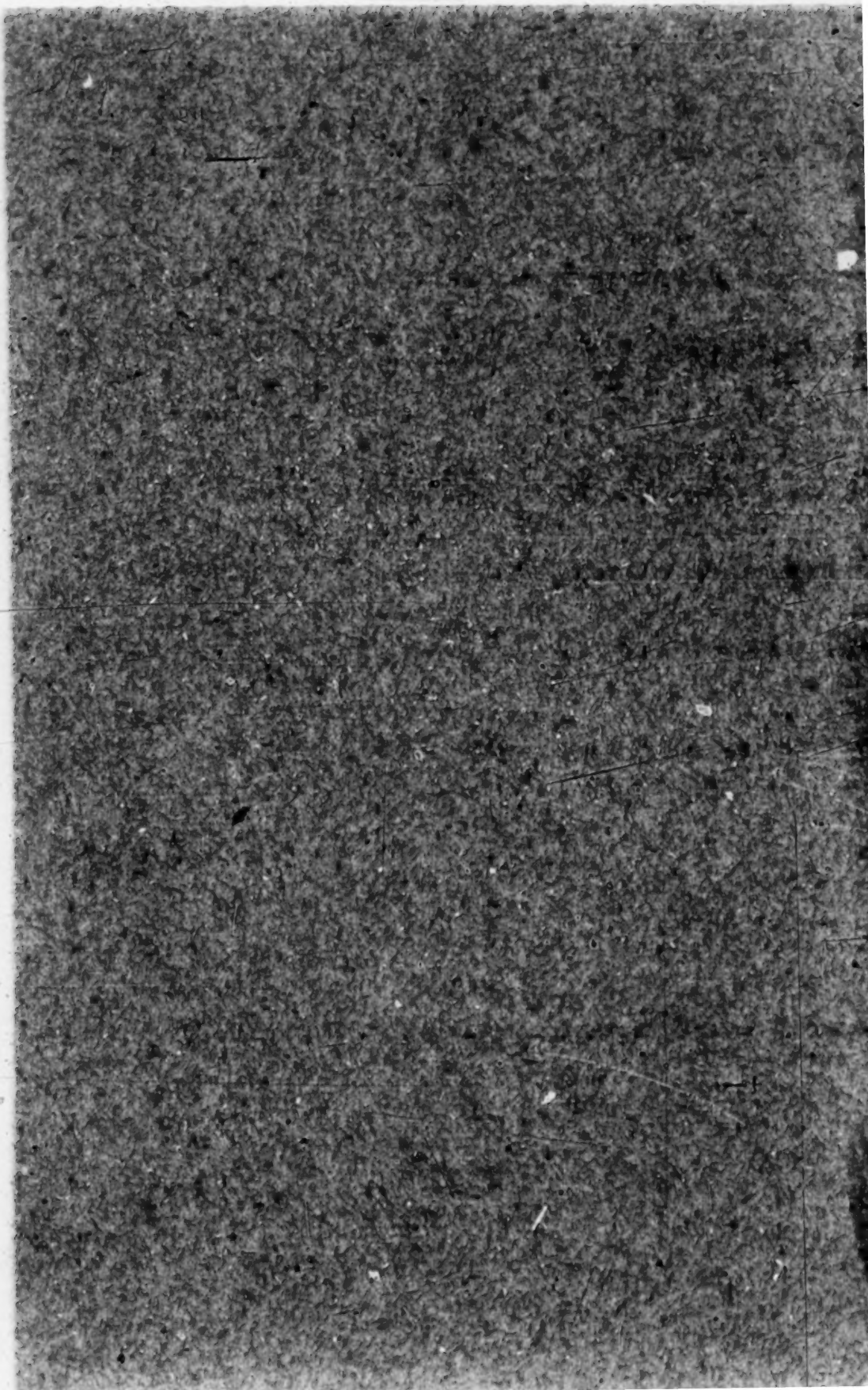
every rivulet, creek and stream and take away vested water rights without paying for them; neither do we believe that it was the intention of the Congress, by the enactment of flood control legislation, to authorize the Federal Government to take away or destroy vested water rights, and other property, in non-navigable streams without paying for them. In fact, history refutes the petitioner's contention, and it appears that it has been the intention of Congress to protect such vested water rights, particularly in the seventeen states lying west of the 97th meridian (Oklahoma being one of these states). This is best shown by reference to a few of such Acts. Section 25 of the Act of April 26, 1906, 34 Stat. 137, *supra;* Section 8 of the Reclamation Law of June 17, 1902 (43 U. S. C. A. 383); Section 27 of the Federal Power Act (16 U. S. C. A. 821); Flood Control Act of December 22, 1944, as amended July 26, 1947 (33 U. S. C. A. 701-1).

***Conclusion.***

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Q. B. BOYDSTUN,
P. O. Drawer 112,
Vinita, Oklahoma,
*General Counsel for Respondent.*



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No. 503

# In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

*v.*

GRAND RIVER DAM AUTHORITY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
*Solicitor General,*
PERRY W. MORTON,
*Assistant Attorney General,*
ROGER P. MARQUIS,
*Attorney, Department of Justice,*
*Washington 25, D.C.*

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# In the Supreme Court of the United States

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No. 503

UNITED STATES OF AMERICA, PETITIONER

*v.*

GRAND RIVER DAM AUTHORITY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The majority and the dissenting opinions in the Court of Claims (R. 106–113) are reported at 175 F. Supp. 153.

### JURISDICTION

The judgment of the Court of Claims was entered on July 15, 1959 (R. 106–131). On October 8, 1959, the time within which to petition for a writ of certiorari was extended, by order of the Chief Justice, to October 30, 1959 (R. 132). The petition for a writ of certiorari was filed on October 29, 1959, and was granted on December 14, 1959 (R. 132). The jurisdiction of this Court rests on 28 U.S.C. 1255.

## STATUTES INVOLVED

Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, 1151, 33 U.S.C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

Section 23(b) of the Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 817, provides:

> It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the

United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Section 25 of the Act of April 26, 1906, 34 Stat. 137, 146, is set out in the Appendix, *infra*, pp. 47–49.

Portions of the Oklahoma Session Laws, 1935,

c. 70, Art. 4, pp. 350, *et seq.*, as amended, 82 Okla. Stat. Ann. (1952), Secs. 861–881, are printed in the findings (R. 114–116). In addition, 82 Okla. Stat. Ann., Sec. 862 (quoted in part in the findings, R. 115), authorizes the Grand River Dam Authority:

> (a) To control, store and preserve, within the boundaries of the District, the waters of Grand River and its tributaries, for any useful purpose, and to use, distribute and sell the same within the boundaries of the District; provided, however, that any municipal corporation within the area included within the jurisdiction of the said Grand River Dam Authority shall be entitled to take water from the Grand River and any of its tributaries in any quantities that may be needed by such municipal corporation without payment of any fees or charges for such water.

Section 862(e) (also quoted in part in the findings, R. 115) authorizes the Authority:

> (e) To acquire by purchase, lease, gift, or in any other manner, and to maintain, use and operate any and all property of any kind, real, personal, or mixed, or any interest therein; and to own, construct, operate and maintain any project or works in conjunction or jointly with any other department or agency of the State of Oklahoma or the United States of America, or any department or agency thereof, within the boundaries of the District, necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act.

Section 862(f) (quoted in part in the findings, R. 116) authorizes the Authority:

> (f) To acquire by condemnation any and all property of any kind, real, personal or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation; provided that nothing in this Act shall ever be construed to authorize the District to acquire by condemnation any privately, municipally or publicly owned electric public utility system or any part thereof outside of the high water mark of a reservoir area or outside a properly located damsite, except the Districts may require the relocation of transmission lines and substations so owned where such relocation is necessary for the contruction and maintenance of dams, reservoirs, levees, spillways and floodways, and in such event just compensation shall be paid. Provided that the Grand River Dam Authority shall have the right to cross transmission lines of other electric utility companies under proper engineering standards of construction as approved by the Corporation Commission.

Section 862 concludes with the proviso, as follows:

> Provided, however, that in the course of exercising its powers as herein enumerated the said District shall at all times consider the rights and needs of the people living within and upon the land lying with the watershed of the rivers or streams developed by the District; provided, however, that nothing herein shall

prevent the District from selling for irrigation purposes within the boundaries of the District any water impounded by it under authority of law, provided that nothing herein contained shall authorize the State to engage in agriculture except for educational and scientific purposes and for the support of its penal, charitable, and educational institutions.

## QUESTIONS PRESENTED

1. Whether the federal commerce power extends to tributary streams which, though not themselves navigable, substantially affect navigation, thus immunizing the United States, when it builds a dam upon such a stream for purposes which include the improvement of navigation and the control of floods, from liability to a State (or its agency) for depriving the latter of the economic opportunity to exploit the power potential of the waters.

2. Whether the State of Oklahoma so owned the waters of such tributary stream as to entitle its agency to compensation because of use by the United States of such waters for dam and reservoir purposes.

## STATEMENT

The facts are substantially undisputed and may be summarized as follows:

The non-navigable Grand River originates in Kansas where it is called the Neosho River. It flows through Oklahoma in a southeasterly and southerly direction to the navigable Arkansas River. History relevant to the present controversy goes back to 1930 when the Army Corps of Engineers made intensive studies concerning possible development of dam and

reservoir projects, considering sites at Pensacola, Markham Ferry and Fort Gibson.[1] The resulting report to Congress concluded that federal development was not economically justified at that time. H. Doc. No. 308, 74th Cong., 1st Sess., Cong. Doc. Ser. No. 9936, vol. 3 (Fdgs. 1–3, R. 114).

In 1935, the respondent, Grand River Dam Authority ("the Authority"), was created by the State of Oklahoma (Fdg. 4, R. 114–116). The Authority prepared a plan for development of the river which contemplated dams (proceeding downstream) at Pensacola, Markham Ferry and Fort Gibson, a stretch of about 50 miles (Fdg. 6, R. 116–117; see Map R. 6A). At the same time, investigations (including public hearings) were being made as to the feasibility of a federal river-improvement plan, and the chairman of the Authority's Board of Directors suggested a cooperative effort (Fdg. 7, R. 117–118). The Army Engineers recommended to Congress construction and operation of a three-dam coordinated project as a federal undertaking (H. Doc. No. 107, 76th Cong., 1st Sess., Cong. Doc. Ser. No. 10351), and the Flood Control Act of August 18, 1941, 55 Stat. 638, 645, incorporated that Grand River plan into the comprehensive plan for the Arkansas River Basin (Fdg. 10, R. 121–122).

[1] Earlier, in 1929, a private corporation named Grand-Hydro was formed for the purpose of developing water power and irrigation on the Grand River but it never constructed a dam or any other works. See *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359. The District Engineer's Report in 1931 says that an organization known as the Grand River Power Company had obtained State of Oklahoma permits to erect a series of dams on the Grand River. H. Doc. No. 308, vol. 3, p. 1242.

With financing by the Public Works Administration, consisting of an $8,500,000 grant and an $11,500,000 loan, the Authority built the Pensacola project, which it finished in 1940 (Fdg. 8(a), R. 118). The Authority had filed a declaration of intention under Section 23(b) of the Federal Power Act. The Federal Power Commission found that the proposed project would affect the interests of interstate commerce, whereupon the Authority sought and was granted a Federal Power Act license. See *Grand River Dam Authority* v. *Grand-Hydro,* 335 U.S. 359, 366. The license provided that the project be operated under federal control, storage capacity between elevations 745 and 755 being expressly reserved for the control of floods (Fdg. 8(c), R. 119). In June 1941, the Secretary of War promulgated regulations to govern the operation of the Pensacola project (Fdg. 9, R. 121).

During World War II, the United States took over operation of the Pensacola project in the interests of national defense, and at the same time preliminary steps (including public hearings) were taken with a view to federal construction of the Fort Gibson dam. Definite construction plans were delayed, however, because of the wartime materials shortage (Fdgs. 11, 12; R. 122). In 1945, the Governor of Oklahoma expressed to the Chief of Engineers approval by the State of the federal plans for development of the Arkansas River, including the Fort Gibson project, and said (Fdg. 14(a), R. 123): "I am unable to find words with which to express my commendation for your able and progressive leadership before and dur-

ing the war in originating and developing this program * * *."

Construction of the Fort Gibson project was commenced in 1946 and completed in 1950, the powerhouse being completed in 1953. Its purpose is stated in the findings below (Fdg. 17, R. 125):

> The Fort Gibson project was constructed by the defendant [the United States] as an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of hydro-electric power on the Arkansas River, a navigable waterway, and its tributaries. The project has been operated to carry out these purposes.

The Fort Gibson project is a "run of the river" project, and production of power depends on releases from the Authority's Pensacola project. There is a maximum draw-down (*i.e.*, difference between the bottom and the top of the power pool) of three feet, and storage capacity between elevations 554 and 582 feet is reserved for flood control waters (Fdg. 18, R. 125).

Meanwhile, in 1946, the Authority had sought a preliminary permit to build a project at Markham Ferry, but the Federal Power Commission (in 1949) dismissed the application because of the authorization of a federal project. However, Congress, by the Act of July 6, 1954, 68 Stat. 450, modified the plan for the Arkansas River Basin so as to authorize construction of the Markham Ferry project by the Authority[2]

---

[2] The 1954 Act authorized a $6,500,000 appropriation as a federal contribution because of flood control benefits, with a "release clause" when that amount should be received by the Authority. We understand, contrary to the implication of the

(Fdg. 21, R. 128). The Authority applied for, and in 1955 the Federal Power Commission issued, a license for the Markham Ferry project, subject to conditions as to federal control for navigation and flood control similar to the conditions applicable to the Pensacola project (Fdgs. 21–22, R. 128–130).

During the planning and construction phases of the Fort Gibson project, various claims to compensation were asserted by the Authority. The Corps of Engineers agreed that compensation was owing for the taking of any physical property of the Authority but not for "the intangible rights" claimed by it (Fdg. 15, R. 124). A 70-acre tract which the Authority owned was condemned, and mutually agreeable arrangements were made for the federal acquisition of flowage rights over lands of the Authority and for relocation of transmission lines, $210,140.80 being paid to the Authority (Fdg. 19, R. 125–126).

The Authority asked the Federal Power Commission to assess against the United States an annual charge because of the benefits alleged to accrue to the Fort Gibson project from storage at the Pensacola project. The Power Commission refused on the ground that the Power Act did not authorize such assessment of charges against the United States, and the Court of Appeals for the Tenth Circuit concurred in this conclusion. *Grand River Dam Authority* v.

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majority opinion and the findings of the Court of Claims that this sum has been appropriated. However, it has not yet been paid; hence it would be premature to discuss here the question whether acceptance would constitute a release of the present claims.

*Federal Power Com'n*, 246 F. 2d 453 (Fdg. 20, R. 126–127).

This suit was filed in May 1956 to recover $10,000,000 on the grounds of a taking (as summarized by the majority of the Court of Claims (R. 107)) of (1) the Authority's water power rights at the Fort Gibson unit, (2) its exclusive franchise to develop electric power and energy at the Fort Gibson unit, and (3) certain items of severance damages, including storage and headwater benefits accruing from the Pensacola unit to the Fort Gibson unit; the cost and value of surveys, plans and specifications for the Fort Gibson unit; and the loss of the use and value of certain lands and rights-of-way theretofore acquired for the interconnection of the Fort Gibson unit with the Authority's system and for the distribution of electric power and energy from the Fort Gibson unit. The claims asserted under "(3)" may be disregarded since they were rejected by the Court of Claims and no review has been sought of that ruling. The proceedings below were limited to the issue of liability, with questions as to the amount of compensation or damages reserved.

The majority of the Court of Claims held that the United States was liable on the first two claims (R. 106–110). Two judges dissented on the ground that there was no taking of private property, but simply the exercise of the superior right of the United States to erect the Fort Gibson dam in aid of navigation and commerce (R. 110–113).

## SUMMARY OF ARGUMENT

### I

Respondent Authority has been (or will be) paid for all fast lands, easements, power lines and physical property affected by the construction of the Fort Gibson Dam and Reservoir. The only question is its right to compensation for the alleged taking of its "vested water rights" and of its state "franchise" to develop electrical energy at the Fort Gibson site.

A. The Court of Claims has distinguished the line of cases represented by *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, and *United States* v. *Twin City Power Co.*, 350 U.S. 222, on the ground that the Grand River, unlike the streams involved in those cases, is non-navigable. *Twin City* (and like cases) held that, when the United States exercises its superior commerce power, it incurs no obligation to a riparian owner who has lost, as a result of such regulation, the prospect of utilizing the water power inherent in the fall of the river. This Court, in *Twin City*, reasoned that the riparian owner had no right to place a dam in the stream—an act long prohibited in the absence of a federal license—and that he had no complaint when the United States exercised its prerogatives directly instead of delegating them by license. "What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys." 350 U.S. at 228. A right under state law to develop hydroelectric power "has value or is an empty one

dependent solely on the [Federal] Government" (*ibid.*).

We think that no distinction can properly be drawn between *Twin City* and the instant case on the ground that the Grand River is non-navigable. The question, in our view, is not whether the Grand River is navigable but whether it directly and substantially affects navigation and commerce in the Arkansas River Basin. If so, the Fort Gibson project is within the federal power and the consequences are no different than they would be if the dam were a few miles below, rather than a few miles above, the historic head of navigation.

As early as *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, construing the Rivers and Harbors Act of 1890, this Court emphasized that the United States may protect the "navigable capacity" of a navigable stream and that the statute, which prohibited obstructions to such capacity, was not to be confined to acts done within the navigable stream itself. And in *Oklahoma* v. *Atkinson*, 313 U.S. 508, involving an attack by the State against the authority of the United States to construct the Denison Dam on the non-navigable Red River, the Court unanimously upheld that authority, pointing out that control of non-navigable waters may "be essential or desirable in the interests of the navigable portions" and may constitute "the key to flood control" on the navigable stream (pp. 525–526).

This very respondent, when it was in the position of condemnor (*vis-à-vis* a private company claiming

power-site value for its fast lands) as a result of having been licensed by the Federal Government to construct the Pensacola Dam on the Grand River (see *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359), advised this Court that the Grand River is an important and principal tributary of the navigable Arkansas; that the contemplated Pensacola, Markham Ferry and Fort Gibson Dams were indispensable and integral parts of the comprehensive plan authorized by Congress for the Arkansas River Basin; and that it was "established beyond controversy" that control of the Grand River fell within the federal commerce power. It further stated that a right conferred by state permit "fades and disappears" when asserted against the United States or its licensee (a point which this Court did not find it necessary to decide in the *Grand-Hydro* case because it concluded that the Authority had *not* proceeded against the condemnee in its capacity as a federal licensee).

The Court of Claims, moreover, has unequivocally found that the Fort Gibson project is an "integral part of a comprehensive plan for the improvement and regulation of navigation, the control of floods, and the production of hydroelectric power on the Arkansas River and its tributaries." Since the Government's project can be viewed only as an appropriate exercise of the commerce power, the rule of the *Twin City* case applies with full force: The United States, having exercised its prerogatives in lieu of delegating them, does not thereby become liable to those whose interests are subordinate.

B. Moreover, on ordinary eminent domain principles, it appears that there has been no taking of property giving rise to a right of compensation.

The Authority, although it asserts the loss of "vested water rights," is in no position to claim loss of riparian rights since no riparian land is involved. Moreover, it does not bring itself within the doctrine of prior appropriation for it does not assert that it has put to beneficial use any water of which it will be deprived by construction and operation of the Fort Gibson Dam. The water put through the Government's turbines at Fort Gibson (water already twice used by the Authority at upstream points) is not in fact consumed or diverted; it is simply returned to the river.

Respondent also claims that the Federal Government has taken its state franchise to produce hydroelectric power at Fort Gibson. But, apart from the fact that respondent has no monopoly under state law, there is a sharp distinction to be drawn between a taking and a frustration. *Omnia Co.* v. *United States,* 261 U.S. 502. The Government has not taken respondent's state authorization, for which it has neither need nor use; it has simply exercised its own prerogatives. The loss of business opportunities, hopes or expectancies is not compensable under the Fifth Amendment.

II

One premise of the decision below is that, under the doctrine of prior appropriation, the State of Oklahoma owns *all* the waters within its borders, including unappropriated waters. If accepted, that

declaration would reject the long-continued position of the United States that the western States do not own all the *unappropriated* water within their boundaries. The Federal Government has urged that position for many years but it has not been decided, and was found by this Court unnecessary to decision in *Nebraska* v. *Wyoming*, 325 U.S. 589, and *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275. So here, we believe that this far-reaching question need not be decided because the respondent Authority has failed to sustain its burden of showing ownership by the State of Oklahoma of all the water flowing in the Grand River.

A. Decisions of this Court which are collected, and the history of which is traced, in *United States* v. *Gerlach Live Stock Company*, 339 U.S. 725, and *Federal Power Commission* v. *Oregon*, 349 U.S. 435, make it clear (1) that rights to water, like other property rights in the western States, must stem from some grant by Congress and (2) that the adoption by Congress of certain applications of the prior appropriation doctrine did not constitute a grant to the various States of all the water, including that not appropriated to beneficial use, flowing in those States. The contrary view of the Court of Claims—the only basis given for its declaration of state ownership—is plainly wrong.

B. The Authority has not shown any other basis establishing Oklahoma's title to the waters of the Grand River used by the Fort Gibson project. While Oklahoma water law is far from clear, it is, at least, plain that both the riparian and appropriation doc-

trines exist there to some extent. According to the Authority, the Grand River flows through what was formerly Indian Territory and in that territory the riparian doctrine was followed. But the riparian doctrine does not support the Authority's position here—as we have pointed out in Point I—nor does the 1906 statute (relied upon by the Authority) relating to developments by private power companies within the Indian Territory constitute a grant to the State of Oklahoma of all unappropriated waters.

Moreover, the assertion that upon statehood the appropriation doctrine automatically applied to all of Oklahoma is clearly wrong, as is shown by the Oklahoma decisions and legislation. Even if it did, the Authority has not shown under what federal statute the State acquired its asserted ownership of unappropriated waters. The Desert Land Act, relied upon by other States for this purpose, does not help Oklahoma since Congress has not applied it to Oklahoma. The decisions of this Court which have been cited for the proposition that state laws governs all questions of water right law do not so hold. And a State cannot, by the device of a so-called "legislative appropriation" of waters not put to beneficial use, create rights as against the United States which it has not granted.

## ARGUMENT

### I

### THERE WAS NO TAKING OF PROPERTY OF RESPONDENT FOR WHICH IT HAS NOT BEEN PAID

Preliminarily, it is important to state what is *not* involved in this case. The Authority has been, or

will be, paid for all physical properties taken in fee or to be flooded by the Government, *e.g.*, transmission lines which must be relocated because of the federal project. Moreover, there is no question relating to compensation for fast lands required for the dam or reservoir.[3] The claim is, rather, that the United States has taken the Authority's "rights" in the flow of the river and its state franchise to develop electrical energy from that source, and that for the taking of these "rights" the United States is required by the Fifth Amendment to make compensation.

A. THE UNITED STATES HAS DIRECTLY EXERCISED FEDERAL PREROGATIVES CONFERRED BY THE COMMERCE POWER. IT IS NOT REQUIRED TO PAY COMPENSATION BECAUSE IT HAS FOLLOWED THAT COURSE IN LIEU OF GRANTING A LICENSE TO A STATE INSTRUMENTALITY.

In *United States* v. *Twin City Power Co.*, 350 U.S. 222, this Court reaffirmed the rule, enunciated many years ago in *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, that there can be no right as against the United States in the flow of the waters of a navigable stream. For this reason, the Court held that the owner of fast lands taken by the United States in connection with a multi-purpose dam project could not include as an element of compensable value the suitability of the lands for purposes related to the development of water power. "What the Government can grant or withhold and exploit for its own benefit," the

[3] For this reason, cases like *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, and *Iowa-Wisconsin Bridge Company* v. *United States*, 114 C. Cls. 464, certiorari denied, 339 U.S. 982, cited by the Court of Claims (R. 108), which involved damage to physical property above high water mark, are inapposite here.

Court stated (p. 228), "has a value that is peculiar to it and that no other user enjoys." "To require the United States to pay for this water-power value would be to create private claims in the public domain." *Ibid.*

Here, as in *Twin City*, we deal with a federal project—a project which concededly serves the purposes of navigation, flood control, hydroelectric power and general watershed development. In the absence of a license from the Federal Power Commission, there could have been no comparable undertaking by a State or its instrumentality or by any private person.[4] The only possible distinction between *Twin City* and this case is that the Savannah River was found to be navigable, whereas the Grand River, involved in this litigation, is a non-navigable river which affects stages of the navigable Arkansas River. The Court of Claims has found this distinction significant. It has rested upon the fact of non-navigability and upon this basis, coupled with its assumption (challenged in Point II, *infra*) that Oklahoma "owns the waters of the Grand River" (R. 108–109),[5] it has held the United States liable to the Authority.

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[4] See *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, 365–366.

[5] In this connection, the court below found (Fdg. 23, R. 131): "The Board of Directors of the plaintiff has never granted to the defendant, or to any department or agency thereof, any franchise, right, or privilege to develop and generate electric power and energy on the Grand River in Oklahoma, or any right, title, or interest in and to the waters of the Grand River for the production of electric power and energy, or any right to control, supervise, conserve, and develop the water power at the Fort Gibson dam-and-reservoir project."

It is not crucial, we submit, that the Grand River is non-navigable at the point where the Federal Government has undertaken to control it. If the flow of the river at such point has a direct and substantial effect upon the river system in its navigable reaches, then, we believe, the United States has the same plenary control as it has over navigable portions of the system. In other words, if the project serves the purposes of navigation, flood control and watershed development—and the Court of Claims has found that it does—the Fort Gibson site is as much subject to the dominant control of the United States as it would be if it were located below the historic head of navigation.[6] And, in our view, the same consequences must follow.

The authorities, we submit, fully support this thesis.

The Rivers and Harbors Act of 1890, 26 Stat. 426, was the first general statute prohibiting obstructions to the navigable capacity of streams.[7] Shortly after

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[6] In point of fact, Fort Gibson, located on the Grand River, is approximately eight miles above the confluence of that river with the navigable Arkansas.

[7] The 1890 Act was revised in 1899 by the Rivers and Harbors Act of that year, 30 Stat. 1121, 33 U.S.C. 403, *et seq.* See discussion of the history of the latter Act in the Government's brief in *United States* v. *Republic Steel Corp.*, No. 56, this Term. Commerce control in relation to water power development was further exercised in the Federal Power Act of June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. 791, *et seq.* That statute was subsequently amended to enlarge federal control over non-navigable tributaries of navigable streams by making it mandatory to file declarations of intention in relation to proposed projects on non-navigable waters. See Section 23(b), *supra*, pp. 2–3.

its enactment, this Court, in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, held (p. 708) that the United States has the constitutional power to guard against incursions upon the "navigable capacity of one of the navigable waters of the United States" and that it would "improperly ignore" the scope of the statute to limit its operation to acts done within the navigable stream itself.

The power of the United States to regulate and control non-navigable tributaries of navigable streams was the core of the controversy in *Oklahoma* v. *Atkinson*, 313 U.S. 508. In that case, this Court unanimously sustained, as against the objections of the State of Oklahoma, the authority of the United States to construct the Denison Dam on the non-navigable Red River. There, as here, one of the functions of the dam was the production of hydroelectric power. The language of this Court is unequivocal. It "is clear," the opinion declares (p. 523), "that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions." "For, just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries" (pp. 525–526). The suggestion that the "project interferes with the State's own program for water development and conservation is likewise of no avail," the Court concluded

(pp. 534–535). "That program must bow before the 'superior power' of Congress" (p. 535).[5]

It cannot be suggested that the Fort Gibson Dam is in any way less "essential or desirable" from the standpoint of flood control and navigation improvement than was the Denison Dam. The Fort Gibson project, as the Court of Claims found, is "an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of hydroelectric power on the Arkansas River and its tributaries" (Fdg. 17, R. 125). The fact that 28 vertical feet of the dam are reserved for control of flood waters (Fdg. 18, R. 125) is striking evidence of the fact that this is a project unquestionably within the scope of the federal commerce power.

In *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, it was the Authority (respondent in this case) which urged (1) that control of the Grand River is essential in the national interest and fully within the commerce power, and (2) that no State-created interests in the waters of the river, or rights of compensation based thereon, could be asserted in the face of the Federal Government's exercise of its commerce control. On that occasion, to be sure, the shoe was on the other foot. The Authority had obtained from

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[5] The opinion discloses (p. 512) that Oklahoma claimed that there would be a "direct invasion and destruction" of the sovereignty and property of the State because "the waters to be impounded belong to Oklahoma but will be taken from it without payment of just compensation". The State also stressed that waters would be diverted from Oklahoma and run through turbines for the generation of power for sale, principally in Texas.

the Federal Power Commission, in 1939, a license authorizing the Pensacola Dam as a project "affecting navigable waters." 335 U.S. at 366. The question was the measure of compensation to be paid by the Authority in Oklahoma condemnation proceedings brought against Grand-Hydro, a private company, for the acquisition of fast lands needed in the project. Grand-Hydro, which had received a state permit in 1931 to construct a dam and develop hydroelectric power at the site, claimed (and the Oklahoma courts agreed) that it was entitled to the value of its land for power-site purposes. See 335 U.S. at 361–363.

In asking this Court to hold that power-site value should not have been allowed by the Oklahoma courts, the Authority stressed, first, that the "Grand River is subject to federal control" (No. 379, Oct. Term, 1947, Petition, p. 26). Referring at length (*id.*, pp. 26–31) to studies by the Corps of Engineers, the Federal Power Commission and the Congress, it asserted that the "Grand River is an important as well as the principal tributary of the Arkansas" (*id.*, p. 26); that the Pensacola, Markham Ferry and Fort Gibson Dams were to be integral parts of a "general comprehensive plan" for the Arkansas River basin "approved by the 1938 Flood Control Act" (*id.*, p. 27); and that "for many years" it has been "established beyond controversy that the Grand River in Oklahoma is such a stream as Congress has jurisdiction over under the Commerce Clause of the Constitution" (*ibid.*).[9]

[9] This statement is to be contrasted with the Authority's suggestion in the instant case (Br. in Opp., p. 13) that the Government would assert federal control over "every rivulet,

The Authority argued, secondly, that inasmuch as it had a federal license and Grand-Hydro did not, Grand-Hydro could not assert any element of value predicated upon its state authorization to harness the waters. We quote again from the Authority's argument (*id.*, pp. 33–34):

> It is indisputable under the record in this case that Congress has assumed and preempted jurisdiction over the Grand River through the passage of the Federal Water Power Act of June 10, 1920, as amended by the Federal Power Act of August 26, 1935, enacted under its authority to regulate interstate commerce; that no riparian owner could acquire the right to utilize the waters of the river or lands riparian thereon for the production of electric power and energy without complying with the provisions of the Federal Power Act. The respondent never complied with the provisions of said Act or acquired under Federal law such right of use. On the other hand, the petitioner did comply with the provisions of the Federal Power Act and obtained from the Commission a license to construct, maintain, and operate its project at the Pensacola location on Grand River, effective January 1, 1939. The date of taking was January 19, 1940. At that time, the respondent could not possibly have acquired such right of use because the petitioner had been granted by the Federal Power Commission

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creek and stream." On the contrary, we rest on the propositions that the Grand River directly and substantially affects federal commerce interests, and that federal control is necessary to achieve the navigation and flood control program approved by Congress for the Arkansas River basin.

> the exclusive right to build and operate its project at the Pensacola location. The respondent not only had not and could not acquire such right of use, but was prohibited by the Federal Power Act from making such use of its lands and the waters of the river. *Respondent's claim to such right of use by virtue of its State permit fades and disappears in the face of this prohibition.* [Emphasis added.]

Although this Court affirmed the state court judgment in favor of Grand-Hydro, it did so in an opinion which inferentially supports the view which we urge in this case. The Court pointed out that the Authority had proceeded in the state courts, under Oklahoma's law of condemnation, in its capacity as a state agency. The opinion turns on the fact that the Authority had not proceeded in its capacity as a federal licensee. The Court observed that the considerations might be "different" if "either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act" (335 U.S. at 373). The opinion then adds, "The United States enjoys special rights and power in relation to navigable streams *and also to streams which affect interstate commerce*" (*ibid.;* emphasis added).

The dissenting opinion in *Grand-Hydro* (in which four Justices joined) objected to the decision on the ground that water power value ought not be allowed whether the condemnation is instituted under the authority of federal or state law. In relation to the scope of the commerce power, the dissenters stated (p. 375, fn. 1):

> The exclusive control which the United States has in the water power of a navigable stream (*United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 69; *United States* v. *Appalachian Electric Co.*, 311 U.S. 377, 427–428) extends to the water power of a non-navigable stream where private command over it is inconsistent with the federal program of control over navigation. *United States* v. *Willow River Co.*, 324 U.S. 499, 509. Federal regulation and control has the same effect in each case. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 525.

Thus, both the majority and the dissenting opinions in the *Grand-Hydro* case appear to recognize that action taken by the United States in the interest of commerce control has the same effect irrespective of whether the stream in question is a navigable one or one which, though not navigable, substantially affects navigation.

It is true that in the case of *United States* v. *Kelly*, 243 U.S. 316 (commonly cited by reference to the companion case, *United States* v. *Cress*, 243 U.S. 316), one of the elements of compensation allowed (an award of $1,500) was based on the fact that the Government's river improvement project had ended the usefulness of a mill located on a non-navigable tributary and operated by a riparian owner. The Court expressed the view that a riparian right to an unobstructed flow of water "exists by the law of nature as an inseparable part of the land" and that "destruction of this right is a taking of a part of the land" (p. 330). The opinion does not rest upon any distinction as between navigable and non-navigable streams, but,

rather, upon the view that riparian owners have certain absolute rights, conferred by the law of nature, to the flow of water, and that impairment of these rights gives rise to a claim under the Fifth Amendment.

This broad statement does not square with any of the pronouncements of this Court from the date of the subsequent *Chandler-Dunbar* case (decided in 1913) to the present day. And although the Court has not expressly overruled *Kelly*, it has all but done so. The *Kelly* case, this Court stated in *United States* v. *Willow River Co.*, 324 U.S. 499, 507, "must be confined to the facts there disclosed." The Court added (p. 510), in language strikingly opposed to that used in *Kelly*:

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interests must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

Assuming that the *Kelly* case has some measure of continuing vitality, it certainly has no application to the facts here. There was no suggestion in *Kelly* that the small mill there involved had any effect on navigable capacity whatever or that its operation interfered in any way with commerce. The mill, moreover,

had been in operation when the United States destroyed its utility by altering the water level. In the instant case, the Authority seeks compensation because the action of the United States destroys a hope or expectancy, namely, that the Authority might, one day, build a dam and produce electric power. However, the construction of a dam at Fort Gibson was flatly prohibited, at all relevant times, by federal law, in the absence of a federal license. Respondent accordingly is not seeking compensation for a going enterprise, conducted in conformity with law, suddenly destroyed in consequence of a federal project. It is seeking compensation because its hopes have been frustrated by the act of the United States in exercising its "superior right" to regulate the stream—because the Federal Government has chosen to exercise its undoubted prerogatives and to build the public project itself, instead of licensing someone else to do it.[10]

We are thus brought back to the principle only recently reaffirmed in the *Twin City* case. Respondent's right under state law "has value or is an empty one dependent solely on the [Federal] Government" (350 U.S. at 228). When the United States exercises control over waters in the public domain, it is not required to pay compensation to those whose hopes or expectations have been frustrated. As in the case of the Twin City Power Company, the Authority in this case "never had a power project

[10] In *Kelly*, moreover, the conclusion was that there had been "a taking of a part of the land." Here, the right asserted is in the stream itself.

on the [river] and as a result of the Government's preemption never can have one." *Twin City, supra,* 350 U.S. at 227.[11]

B. SETTLED PRINCIPLES OF EMINENT DOMAIN LAW BAR A RECOVERY IN THIS CASE

If we are correct in our argument (Point I, A, *supra*) that the Fort Gibson project was an appropriate exercise of the commerce power and that the United States may not be required to compensate for State-created rights when it exercises that power, it is unnecessary to go further. However, we point out additionally that in all events there has been no destruction of property rights upon which the Authority may rest a claim to compensation.

The Authority cannot, of course, claim damage to riparian rights; no riparian land is involved. The Authority does claim water rights based upon the doctrine of appropriation. The doctrine of appro-

[11] The *Twin City* case also points out that this is not a matter of competing property interests. The Commerce Clause "speaks in terms of power, not of property." 350 U.S. at 224. The commerce power may be analogized, in this respect, to the police power of the States to regulate or prohibit the conduct of business enterprises deemed inimical to the public interest. Even where the exercise of such power results in the destruction of a going business, the Fourteenth Amendment does not require compensation by the States. *Mugler* v. *Kansas*, 123 U.S. 623; *Kidd* v. *Pearson*, 128 U.S. 1; cf. *Euclid* v. *Ambler Co.*, 272 U.S. 365. Similarly, the Fifth Amendment imposes no duty on the Federal Government to compensate for business losses (no less, for loss of expectancies) resulting from the exercise of its regulatory functions. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146; *Bowles* v. *Willingham*, 321 U.S. 503; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155.

priation, however, is premised upon prior beneficial use (as is explicitly recognized in the authorities from which respondent quotes (Br. in Opp., p. 8)). In discussing the development of the appropriative doctrine in California, this Court concluded in *United States* v. *Gerlach Live Stock Company*, 339 U.S. 725, 751–752:

> Riparianism, pressed to the limits of its logic, enabled one to play dog-in-the-manger. The shore proprietor could enforce by injunction his bare technical right to have the natural flow of the stream, even if he was getting no substantial benefit from it. This canine element in the doctrine is abolished. "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, . . . ." This limitation is not transgressed by the awards in question which only compensate for the loss of actual beneficial use.

The statutes of Oklahoma demonstrate that the same essential principles apply in that State.[12]

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[12] 60 Okla. Stat. Ann. (1949), Sec. 60, provides:

"The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same."

And 82 Okla. Stat. Ann. (1952), Sec. 1, states:

"Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes shall be appurtenant to specified lands

In the instant case, there is no showing that the United States has interfered with a prior beneficial use of the waters by the Authority. Indeed, the water running through the Government's turbines at Fort Gibson—water which has already been used twice by the Authority at points upstream (see R. 77)—is not consumed at all; it is returned to the river. Moreover, unlike the situation at the Denison Dam, involved in *Oklahoma* v. *Atkinson, supra,* the water which runs past Fort Gibson continues to flow through Oklahoma. The Authority would seem to be in no better position than the plaintiff in *Wolfsen* v. *United States,* 142 C. Cls. 383, certiorari denied, 358 U.S. 907, whose claim that his water rights were taken as a consequence of the Central Valley development was rejected on the ground that "plaintiffs were not entitled to compensation for a legal technicality. They must first show that something of substance has been taken from them."

Here, the only interference has been with a potential use—use of the water for power purposes at the Fort Gibson site. Respondent's claim of "vested water rights" is but another formulation of its contention that the United States must pay Oklahoma or its

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owned by the person claiming the right to use the water, so long as the water can be beneficially used thereon. Priority in time shall give the better right. Provided, that in all cases of claims to the use of water initiated prior to November 15th, 1907, the right shall relate back to the initiation of the claim and beneficial use of such water. All claims to the use of water initiated thereafter shall relate back to the date of receipt of an application therefor in the office of the state engineer, subject to compliance with the provisions of this chapter and the rules and regulations established thereunder."

agent for the privilege of constructing and operating the federal project. Such an interpretation of water law is to revert to the "dog-in-the-manger" possibility—to the approach which this Court said in *Gerlach* was abolished by the prior appropriation doctrine.[13]

Apart from its claim that it had vested water rights, the Authority asserts that its franchise to generate electric power has been taken.[14] But a franchise to engage in a business in the future, unaccompanied by the grant of any right in property, does not give rise to a right of compensation under the law of eminent domain.[15] "Frustration and appropriation are essentially different things," *Omnia Co.* v. *United States* 261 U.S. 502, 513. And see *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 281–283. There could have been no "taking" of respondent's franchise, moreover, because the construction of the project by

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[13] As to the Court of Claims' erroneous assumption that Oklahoma owns the waters of the Grand River, see Point II, *infra*, pp. 35–46.

[14] The Court of Claims states that this franchise was "exclusive" (R. 107). But this does not appear to be the view of the Supreme Court of Oklahoma. See *Sheldon* v. *Grand River Dam Authority*, 182 Okla. 23, 30, 76 P. 2d 355, 363.

[15] The situation is, of course, different where the franchise itself confers rights in specific real property. Such was the case in *Southern Counties Gas Co.* v. *United States*, 141 C. Cls. 28, certiorari denied, 358 U.S. 815 (property rights in the nature of easements), and *United States* v. *Smoot Sand & Gravel Co.*, 248 F. 2d 822 (C.A. 4) (right to remove sand and gravel from tract of land), both cited in the opinion below (R. 109).

the United States in nowise depended upon a permit from the State or its agency.[16]

The Court of Claims cites two decisions of this Court for the proposition that compensation must be paid for the appropriation or destruction of a franchise. The earlier of these, *Frost* v. *Corporation Commission,* 278 U.S. 515, held simply that the owner of a franchise has a right to prevent illegal competition by unlicensed competitors. However, the Authority will hardly argue that the federal project was illegally undertaken or that the United States required a state license.

The second of the cases is *International Paper Co.* v. *United States,* 282 U.S. 399. There, it appeared, the United States had requisitioned, during World War I, electrical energy being produced by the Niagara Falls Power Company. The requisition authorized the power company to increase its hydroelectric capacity by appropriating water which was being taken, pursuant to an existing federal license, by the International Paper Company. This Court concluded that the United States, by its requisition, assumed the obligation to compensate the paper company for the loss of its water supply. The decision rests squarely upon the holding that the paper company had been granted a right to the use of the water subsequently requisitioned and that the Federal Government had not attempted to revoke the grant which it had previously made. What was taken there was

[16] The Court of Claims' finding (Fdg. 23, R. 131, *supra*, p. 19) that the Board of Directors of the Authority did not grant any rights to the United States is irrelevant.

an established and unrevoked right previously enjoyed and put to use.[16a]

In sum, respondent's claim, based upon its state franchise, is no more than a claim that a prospective business opportunity was lost. Such frustration, resulting as it does from the lawful act of the United States, is not compensable as a taking of private property for public use.[17]

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[16a] *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, is also readily distinguishable. We refer to this Court's comment in *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282, n. 12:

"* * * In the *Monongahela* case the United States condemned a lock and dam constructed at the invitation of the United States and operated by the owner under a franchise from Pennsylvania. This Court held that the special facts of the case required that the franchise or going concern value of the enterprise be included in the compensation payable to the owner. It was said in the first place that the franchise granted to the company by Pennsylvania was a valuable property right, since it was a contract under the rule of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, and protected against impairment by the state. Secondly, the Court noted that the United States did more than destroy the business; it appropriated the enterprise for public purposes. Moreover, as was stated in *Omnia Co.* v. *United States*, *supra*, pp. 513–514, the *Monongahela* case 'rested primarily upon the doctrine of estoppel, as this Court has in several cases since pointed out.'"

[17] We note in passing that the Oklahoma Act which created the Authority and conferred the so-called "franchise" contemplated that the development of a system of dams on the Grand River would be a cooperative effort of the Authority and the United States. See, *e.g.*, Section 862(e), *supra*, p. 4, and 862(o), R. 116. Thus, properly speaking, we do not believe that the federal project involves any frustration of either state or federal objectives. Compare *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, and the opinion of the California Supreme Court on remand, *Ivanhoe Irrigation District* v. *All Parties and Persons*, 53 A.C. 696, 718; see also *infra*, pp. 35–36, 45.

## II

### RESPONDENT HAS NOT PROVED OWNERSHIP BY THE STATE OF OKLAHOMA OF ALL THE WATERS WITHIN ITS BORDERS

One premise of the Court of Claims is its declaration (R. 109):

> The State of Oklahoma owns the waters of the Grand River, a non-navigable stream, and the State conferred on the plaintiff all the rights which is [*sic*—it] possessed in the stream. Oklahoma does not follow the common law doctrine of riparian rights but follows instead the doctrine of prior appropriation for beneficial use or the so-called "Arid States Doctrine." Under this doctrine, the water running in a natural stream is the property of the State. Oklahoma Code, Title 60, Section 60 and Title 82, Section 1, O.S. 1951; *Murphy* v. *Kerr,* 296 Fed. 536.

This statement is erroneous and cannot properly provide a foundation for the holding below.

It should be pointed out again that this case deals solely with unappropriated waters; as we have shown *supra,* pp. 29–32, there is no issue as to waters which have been appropriated and put to beneficial use. This problem of the ownership of *unappropriated* waters in the western States is both recurrent and of large importance. In our brief *amicus curiae* in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, at pp. 66–69, we outlined the basis of our contention that title to unappropriated water is not vested in the State of California, but pointed out that, as in

*Nebraska* v. *Wyoming,* 325 U.S. 589, it was unnecessary to decision of that case to determine that issue.[18] In response, the Court said (pp. 290–291): "At the outset we set aside as not necessary to decision here the question of title to or vested rights in unappropriated water. Cf. *Nebraska* v. *Wyoming,* 325 U.S. 589, 611–616 (1945)." The California Supreme Court, upon remand, likewise recognized that, "It is now also crystal clear that the title of the state or of the United States to the unappropriated waters of this state is not involved in these cases." *Ivanhoe Irrigation District* v. *All Parties and Persons,* 53 A.C. 696, 719. The California court went on to point out that, in view of this court's holding, the "trust" theory declared in the first *Ivanhoe* opinion of the California Supreme Court—that the State holds title to the unappropriated waters in trust for all the people of the State—"is not the law of this case, is dicta, and for that reason should not be construed as a statement of the law of California" (*id,* p. 720). The three-sentence declaration by the Court of Claims in this case, if accepted generally, would cut even deeper than the "trust" theory originally advanced in *Ivanhoe.*[19] But that declaration is wrong for various reasons, some related specifically to Oklahoma and some to western water law generally. It seems unnecessary to discuss

[18] It has been argued to the special master in proceedings now pending before him in *Arizona* v. *California,* No. 9, Original.

[19] One aspect of the question is the holding in *Winters* v. *United States,* 207 U.S. 564, 577, that there was an implied reservation of waters for irrigation purposes for the benefit of Indians which was not affected by admission of Montana to the Union "upon an equal footing with the original States."

the broad subject of ownership of unappropriated waters as generally applied to the western States which follow the doctrine of prior appropriation for beneficial use, with variations in many particulars, because the respondent Authority has clearly not borne its burden of establishing ownership by the State of Oklahoma of the waters involved here.

A. THE COURT OF CLAIMS' THEORY OF OWNERSHIP BY THE STATE IS PLAINLY ERRONEOUS

The Court of Claims' theory is simply that, *as a necessary part of the appropriation doctrine,* "the water running in a natural stream is the property of the State." In our view, that primary assumption is wholly incorrect. It is contradicted by two principles which this Court has already affirmed. First, in those States formed out of territory such as the Louisiana Purchase acquired after the country was established, the Federal Government was the initial proprietor, and any claim by the State or by others must derive from this federal title. Second, there is no showing that the United States has granted to the States, through recognition of the appropriation doctrine, residual rights to the *unappropriated* waters.

In *United States* v. *Gerlach Live Stock Company,* 339 U.S. 725, Mr. Justice Jackson, for the Court, pointed out (at pp. 746–748) (a) that, in California before the post-Civil War federal legislation on the subject, the United States, as the owner of the whole public domain, was in a position to challenge appropriative rights, and (b) that in the Act of July 26, 1866, 14 Stat. 251, R. S. 2379, Congress recognized *appropriations* of public domain waters, which rested on local cus-

tom or law. And in *Federal Power Commission* v. *Oregon*, 349 U.S. 435—referring to the 1866 Act, the amendatory 1870 Act and the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. 321—the Court held (pp. 447–448) that the purpose of these statutes "was [federal] governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs" and that the "Desert Land Act severed, *for purposes of private acquisition* [emphasis added], soil and water rights *on public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the State of location." There was no suggestion either in *Gerlach* or in *Oregon* that *unappropriated* waters had been disposed of by Congress.

These decisions make two things clear. First, they recognize that the right to use of water, as in the case of real property secured by the Louisiana Purchase and subsequent acquisitions, must be founded upon some grant by Congress, which has plenary authority to dispose of the public property. Second, the decisions are premised on the proposition that the adoption by the United States of the appropriation doctrine for purposes of acquisition of private rights did not constitute a grant to the western States of title to *all* the waters within their boundaries. The Court of Claims was plainly wrong in holding otherwise. The mere fact that a western State has adopted, in whole or in part, the appropriation system does not mean that the State owns rights to the unappropriated

waters. Some further grant by Congress must be shown.

B. THE AUTHORITY HAS NOT SHOWN STATE OWNERSHIP OF THE WATERS USED BY THE FEDERAL GOVERMENT'S DAM

It seems to us unnecessary to explore with respondent the intricacies and obscurities of Oklahoma water law. For present purposes, it is sufficient to show that the Authority has clearly not borne the burden of proving State ownership of the waters used by the Fort Gibson dam. There is no merit in any of the special grounds heretofore advanced by the respondent in support of its assertion of State ownership.

1. We agree with the Authority that Oklahoma does not follow, solely and exclusively, the doctrine of prior appropriation, as the Court of Claims thought when it erroneously concluded (*supra*, p. 35) that the appropriation doctrine necessarily means that the state owns the unappropriated waters. See *e.g.*, 60 Okla. Stat. Ann. (1949), Sec. 60, and 82 Okla. Stat. Ann. (1952), Sec. 1, quoted *supra*, fn. 12, pp. 30–31; see, also, *Baker* v. *Ellis*, 292 P. 2d 1037, 1039, where the Oklahoma court referred to its earlier decision concerning rights of riparian owners as against each other, and "the right of all such riparian owners to have the stream substantially preserved in its natural size, flow and purity and protected against material diversion."[20] But, as we have noted (*supra*, p. 29),

[20] Weil, *Water Rights in the Western States* (3d ed., 1911), Sec. 117, pp. 137–138, lists Oklahoma as possibly following the "California Doctrine" where appropriation and riparian rights exist side by side, rather than the "Colorado Doctrine" rejecting the common law *in toto*.

the riparian doctrine does not help the Authority since it owns no riparian land. Indeed, the running of the water through the Government's turbines—which does not involve consumption or diversion—would not injure anyone under the definition of riparian rights (quoted above) adopted by the Oklahoma court. See, also, *supra*, p. 31; *infra*, pp. 41–42.

2. In answer to our argument that the State's asserted title must stem from the Federal Government, the Authority seems to say that Oklahoma is not a "public lands state" (Br. in Opp., p. 5), and therefore that it is incorrect to seek to trace all titles to the Federal Government. But in the sense of a listing of the western public domain States which follow to some degree the prior appropriation doctrine, Oklahoma plainly is one of those States. See, *e.g.*, Weil, *Water Rights in the Western States* (3d ed., 1911), Sec. 66, p. 66. Of course, all lands in that State were no more subject to sale under the narrower definition of "public lands" used in the federal disposal statutes than were all the lands in the other western States in each of which lands were reserved in great quantities for Indian and military reservations and other purposes. *E.g.*, *Federal Power Commission* v. *Oregon*, 349 U.S. 435, *supra*. But it is enough that title to all real property in Oklahoma must in some manner be traced to a federal grant. Actually, almost the entire area of what is now Oklahoma was an Indian reservation which was gradually reduced over the years. See the thumbnail outline of this history in Okla. Stat. Ann. (1952), Constitution, pp. XIII–XXX. Lands which

were relinquished by the Indians under treaties or agreements were patented as public lands. For the purposes of determining the rights of the Federal Government (*vis-à-vis* the State) to unappropriated waters, the important factor is whether the lands were federal, not whether they were technically "public" lands rather than federal non-"public" lands; the Authority creates an artificial meaning of no present relevance in insisting that lands in the Indian Territory never were "public" lands (Br. in Opp., p. 5). The critical element is the federal character of the property within the State before it became a State. It is on the basis of that postulate that the respondent must somehow show a grant from the Federal Government.

3. Respondent seeks to solve this problem by claiming that the common law of riparian rights applied in Indian Territory (Br. in Opp., p. 5)—so that (in respondent's view) the Federal Government was the proprietor of water rights in that Territory only as riparian owner [21] but that "upon statehood, the Arid States Doctrine was placed in force in that part of Oklahoma which was formerly Indian Territory" (Br. in Opp., p. 6), with the claimed result that the riparian rights of the Federal Government were instantaneously divested and somehow fell into the waiting hands of the State. This curious hybrid hypothesis has no validity.

(*a*). In the first place, there is no ground whatever for asserting that, by fiat, a shift was made at the

[21] Under this theory, the United States would be the owner of the rights to use waters of the Grand River which run through Indian Territory, and the State of Oklahoma would have no title.

moment of statehood from one doctrine of water rights to the other. Respondent cites no authority and no reason for its unsupported statement that there was an automatic change-over. Certainly, California, which has been struggling with the problem of reconciling the two doctrines for about a century, would be glad to have such a simple solution. Oklahoma's problem in this connection is well stated in *Appropriator vs. Riparian, A Preliminary Examination,* 10 Okla. L.R. (1957) 416, 419:

> Suppose at the birth of a body politic, the Goddess of Discord decreed that the infant state adopt both the riparian and appropriation techniques of acquiring water rights. Suppose further that the state did so but failed to provide how the two systems should be meshed together. This is not the posing of an academic problem. It is a description of Oklahoma's situation.[22]

(*b*). The Authority's next hurdle, even if it had shown that only the appropriation doctrine now applied in Oklahoma, would be to establish State title to

[22] Especially applicable to the Indian Territory is the statement, *id.*, pp. 420–421: "It is interesting to speculate as to the significance of the fact that titles in eastern Oklahoma can be said to have their inception from the date of the treaties with Five Civilized Tribes. All of these antedate discovery of gold in California and hence the development of the doctrine of appropriation, much more the date of recognition of the principle by the federal government. There are, no doubt, other factors stemming from Indian titles which would present equally interesting problems should Oklahoma attempt to follow a pattern similar to the California solution. Perhaps the peculiar origin of some of our titles will effect any attempted solution." And compare *Winters* v. *United States*, *supra*, 207 U.S. 564.

all flowing waters, including unappropriated waters. The State of Oklahoma cannot, as did Oregon in *Federal Power Commission* v. *Oregon,* 349 U.S. at 455, *supra,* rely upon the Desert Land Act, because that Act does not apply to Oklahoma. The 1866 Act, quoted in the *Gerlach* case, *supra,* p. 37, clearly does not help Oklahoma's claim to unappropriated water. It only applied when "by priority of possession, rights * * * to the use of water * * * have vested and accrued * * *", and its effect, as stated in the *Gerlach* opinion, was to make "good appropriations in being as against a later patent to riparian parcels of the public domain, and remove[d] the cloud cast by adverse federal claims." 339 U.S. 725, 748. There is nothing in this statute indicating a grant to any State of all the water flowing within it. The Act dealt only with an appropriation achieved by applying the water to beneficial use. It did not deal at all with waters not so appropriated.

For similar reasons, the Authority cannot rely on another of its bases for asserting that the Federal Government no longer has ownership of the water rights involved here. Respondent has said (Br. in Opp., p. 6): "Before the Indian Territory was admitted into the Union, the United States had released its right to control the waters of non-navigable streams in the Indian Territory for the development of electric power and energy and other purposes." Section 25 of an Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and other purposes, April 26, 1906, 34 Stat. 137, is quoted, and respondent asserts (Br. in

Opp., p. 6) that under this Act "when the Indian Territory was admitted as a state, all of the water rights in non-navigable streams were placed under the control of the State of Oklahoma."

The full text of this statute (Appendix, *infra*, pp. 47–49) raises a grave question whether water rights were intended to be dealt with at all, except possibly to the extent that there might be interference with riparian rights held by or for the Indians. In any event, this statute is a far cry from legislation like the 1866 Act, *supra*, p. 43, in which Congress expressed the specific consent of the United States to the appropriation doctrine as applied to certain designated circumstances. Moreover, the 1906 Act would be, at most, a grant of rights to "any light or power company." It is not a grant of anything to the State of Oklahoma or the Authority. If there were any ambiguous language which might possibly be stretched into a grant of all waters to the State of Oklahoma, such a construction would be precluded by the principle that all federal grants are construed in favor of the Government so as to transfer only what is expressly stated (*United States* v. *Union Pacific R. Co.*, 353 U.S. 112, 116), as well as the principle that general statutes are construed against the relinquishment of existing rights of the Indians (*United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 354). Above all, the respondent Authority, as seems frequently to be true in this field, confuses "title" with "regulation", when it speaks of the United States as releasing by this statute its right to *control* the waters (Br. in Opp., p. 6). The Federal Government had full power, as

sovereign, to regulate all the waters of the Indian Territory—before Oklahoma became a State—and that is the authority it was exercising in the 1906 Act on which respondent relies. There was no grant of *proprietary* rights which could fall to the State when Oklahoma thereafter entered the union.[23]

4. There remains for comment the Authority's assertion (Br. in Opp., pp. 5, 6–7) that there were no unappropriated waters in the Grand River at the time of passage of the Flood Control Act of 1941. This contention is based on the Oklahoma Water Code and a declaration of a State District Court that the Water Code "is a legislative appropriation." Regardless of labels, there has not, in fact, been a beneficial use of the water at the Fort Gibson site by the State or its agency. There has been no appropriation in the

[23] Respondent erroneously relies on *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, and *Rank* v. *Krug*, 90 F. Supp. 773 (S.D. Calif.), as indicating the subordination of federal law to state law in this field of water law. In *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, this Court held that the California Supreme Court was wrong in thinking that the federal statutes, especially Section 8 of the Reclamation Act, had subordinated federal interests to state water law. The Supreme Court of California recognized this error in its decision upon remand of the *Ivanhoe* and related cases. *Ivanhoe Irrigation District* v. *All Parties and Persons*, 53 A. C. 696, 710–712. We believe that the two decisions in *Ivanhoe* make plain the error of the district court in *Rank* v. *Krug* and that this will appear on the appeals now pending in the *Rank* case. The opinion in *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225, classified *Niagara Mohawk* with *Gerlach Live Stock* as cases where Congress had elected to recognize particular State-created rights, exercising "less than its constitutional power."

normal sense. And certainly the State cannot, by a boot-strap process of declaring a "legislative appropriation", create greater rights in its agency than it itself possesses. In this respect the Grand River situation would seem to be no different than those instances, like that in California, where the States have declared, *ipse dixit*, that all the waters of the state are held in "trust" for its people. Cf. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, see *supra*, pp. 35–36. Such "legislative appropriations" do not constitute the beneficial use which the appropriation doctrine requires in order to establish ownership. Failing proof of such ownership, the Authority has not established a case for the taking of its title to the water flowing through or over the Government's dam and power facilities.

## CONCLUSION

For the foregoing reasons, it is submitted that the decision below should be reversed with directions to dismiss the petition filed in the Court of Claims.

Respectfully submitted,

J. LEE RANKIN,
*Solicitor General.*

PERRY W. MORTON,
*Assistant Attorney General.*

ROGER P. MARQUIS,
*Attorney.*

APRIL 1960.

# APPENDIX

Section 25 of the Act of April 26, 1906, 34 Stat. 137, 146, provides as follows:

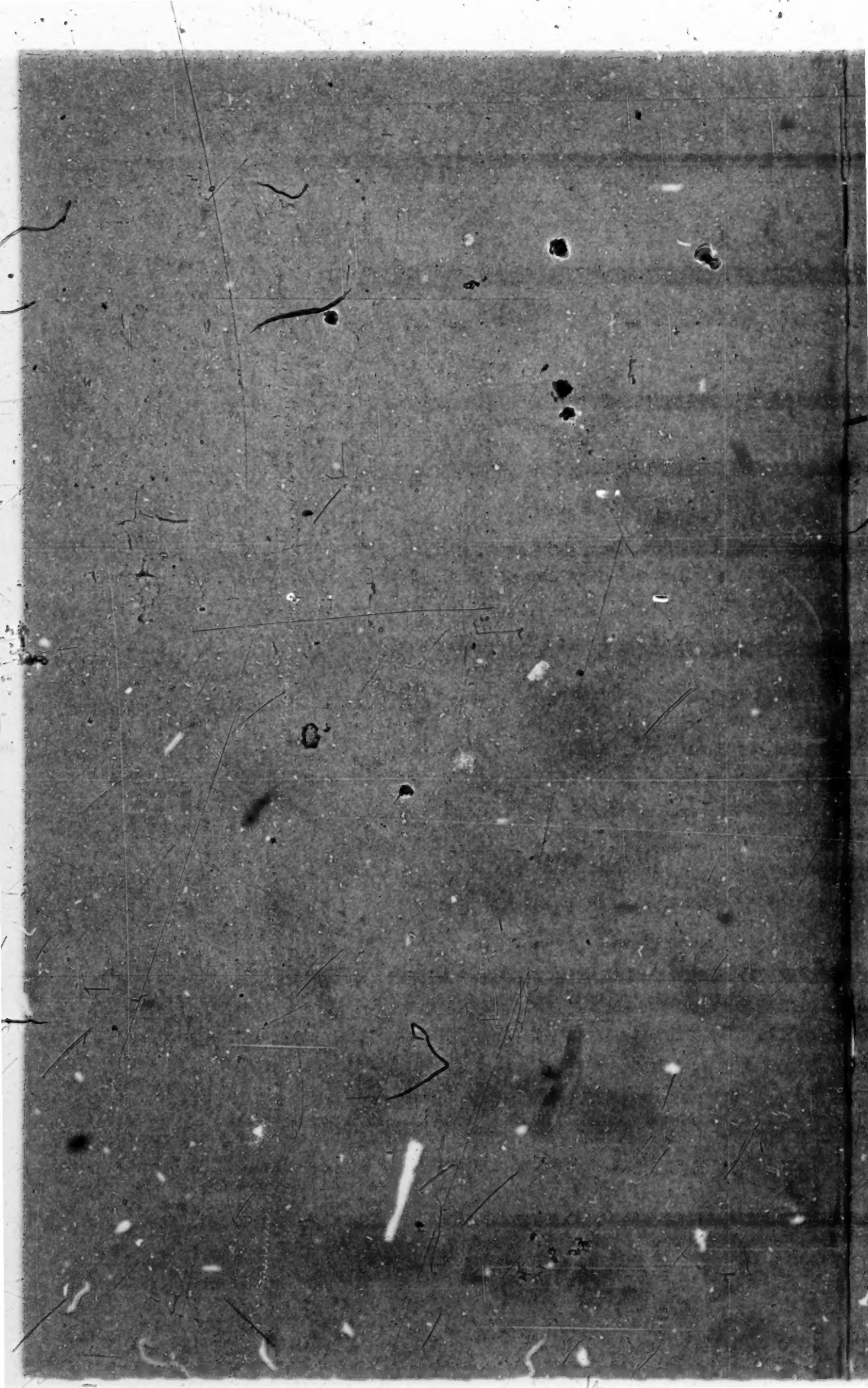
> That any light, or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any nonnavigable stream within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory.
>
> That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by

any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this Act: *Provided*, That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.

In case of the failure of any light, or power company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this Act all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an Act of Congress entitled "An Act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Public Numbered Twenty-six), and all such proceedings hereunder shall conform to said sections, except that sections three and four of said Act shall have no application, and except that hereafter the plats required to be filed by said Act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said Act,

for the purpose of this Act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs and auxiliary steam works, pole lines and conduits are to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided*, That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated.

U. S. GOVERNMENT PRINTING OFFICE: 1930



SUPREME COURT, U. S.
No. 503
MAY 13 1960
JAMES R. BROWNING, C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

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UNITED STATES OF AMERICA, *Petitioner*

v.

GRAND RIVER DAM AUTHORITY, *Respondent*

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On Writ of Certiorari to the United States Court of Claims

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## BRIEF FOR RESPONDENT

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Q. B. BOYDSTUN
P. O. Drawer 112
Vinita, Oklahoma

JESS LARSON
1000 Connecticut Ave., N. W.
Washington 6, D. C.

*Attorneys for Respondent.*

FORD, LARSON, GREENE & HORAN
1000 Connecticut Ave., N. W.
Washington 6, D. C.

ALAN Y. COLE
815 15th Street, N. W.
Washington 5, D. C.

*Of Counsel*

PRESS OF ROBERT S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

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No. 503

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UNITED STATES OF AMERICA, *Petitioner*

v.

GRAND RIVER DAM AUTHORITY, *Respondent*

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**On Writ of Certiorari to the United States Court of Claims**

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## BRIEF FOR RESPONDENT

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### QUESTION PRESENTED

Respondent, Grand River Dam Authority, respectfully submits that the questions presented in petitioner's brief do not correctly state the issue in this case. The real question presented is:

Whether respondent's vested water and franchise rights, acquired under state law, in a non-navigable stream can be taken or destroyed by the United States without the payment of just compensation.

## STATEMENT

In view of omissions in petitioner's statement, we believe it appropriate to make the following supplemental statement.

The Corps of Engineers of the United States Army completed feasibility studies of the Grand River in 1932. A report of these studies was published as House Document 308, 74th Congress, First Session. The study and report concluded that federal development of the lower reaches of the Grand River was not economically justified at that time. (Fdg. 3, R. 114).[1]

Following these studies and report, the State of Oklahoma, by legislative enactment, created the Grand River Dam Authority, a public corporation, for development of hydro-electric power on the Grand River. (Session Laws of Oklahoma, 1935, Chap. 70, Art. 4, p. 350 *et seq.*) This Act "appropriated to and vested in" the Authority all of the water power rights in the Grand River, together with the exclusive right and franchise to develop and use the waters for the produc-

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[1] The report specifically stated:

> "[T]here is no present or prospective income to be had from reservoired waters for public or private use other than that to be obtained from construction of power and water supply reservoirs, which should be developed by private capitals." House Doc. No. 308, 74th Cong., 1st Sess., at p. 1260.

In addition, this Document recommended "that there be no participation by the United States in the control of floods in the Grand (Neosho) River watershed" *Id.* at p. 1261.

tion of water power and electric energy and other beneficial purposes. *City of Tulsa* v. *Grand-Hydro*, District Court of Mayes County, Okl., Pl. Ex. 1, R. 91 at R. 101;[2] accord, *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, 362-64; Fdgs. 4-5, R. 114-16.

Respondent, Grand River Dam Authority, prepared a comprehensive plan for the storage and control of the waters of the Grand River, and its tributaries within the State of Oklahoma, in order to make beneficial use of such waters for the development and generation of electric power and energy. By 1939, respondent had developed a plan which contemplated the construction, maintenance and operation by respondent of three dam-and-reservoir projects on the Grand River, with hydro-electric generating units at the several projects. All were to constitute a single system functioning under unified control. The first of these projects was to be constructed at Pensacola, the second down-stream from Pensacola at Markham Ferry, and the third down-stream from Markham Ferry at Fort Gibson. Under the plan, the Pensacola project was to provide the principal headwater and power storage, and the installations at Markham Ferry and Fort

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[2] The decree in *City of Tulsa* v. *Grand-Hydro*, which is set out in full in the record (R. 91-105), found and adjudged as follows:

> "• • • no person, firm or corporation other than the Grand River Dam Authority has acquired since statehood the right to appropriate any of the waters of Grand River to a beneficial use; that Art. 4 of Chapter 70 of the 1935 Session Laws of the State of Oklahoma, which became effective on the 29th day of July, 1935, *appropriated to and vested in the Grand River Dam Authority*, the absolute right to control, store and preserve the waters of Grand River for the purposes set forth in said Act • • •." (Emphasis added) (R. 101).

Gibson were to be "run of the river" plants. The plan contemplated that the water stored at Pensacola would be used three times for the generation of electric power and energy: first, through the Pensacola unit; second, through the Markham Ferry unit; and then through the Fort Gibson unit. (Fdg. 6, R. 116-17).

The United States did not express any affirmative interest in the development of the Grand River until the Flood Control Act of August 18, 1941, 55 Stat. 638.

Prior to the enactment of the Flood Control Act of 1941, the Authority completed the construction of the Pensacola unit and completed plans for the Markham Ferry and Fort Gibson units; and also acquired lands, easements, rights-of-way and constructed transmission lines, substations and facilities of such capacity and voltage to interconnect and make workable the three units (Fdgs. 8(d), (e), R. 120-21).[3]

Also prior to enactment of the Flood Control Act of 1941, the Authority issued revenue bonds in the amount of $10,000,000 to finance the construction of the Markham Ferry and Fort Gibson projects (Fdg. 8(b), R. 118), pledging as security for the payment of these bonds the revenues derived from its properties, *including vested water rights and franchise rights in the Grand River.*

The Authority, of course, never procured a license for the Fort Gibson project. It did, however, procure a license for the Markham Ferry project. (Fdg. 21(g),

[3] The size of the transmission lines constructed prior to the taking by the United States of the Fort Gibson Dam site were of such size (110 Kv.) as to adequately transmit the power to be created at the two downstream damsites. (Exhibit A to Petition at R. 6A; see also, R. 77-78).

R. 129). The licenses issued by the Federal Power Commission to the Authority for the Pensacola and Markham Ferry projects retained in the United States no control whatsoever in or over the power pools of these projects. The storage and discharge in the reservoirs above the power pools are under the direction of the Corps of Engineers, all of which was agreed to by the Authority before the licenses were issued. (Fdg. 8(c), R. 119-20; Fdg. 21(g), R. 129; Fdg. 22, R. 129-31).

The court below held that respondent was entitled to just compensation for both its water power rights at the Fort Gibson project and its exclusive franchise to develop electric power and energy at the Fort Gibson project. It has received no payment of any kind for these properties.[4]

Petitioner attacks the judgment of the Court of Claims on two grounds: (1) the Court of Claims erred in holding that respondent has a property inter-

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[4] The condemnation case covering the seventy acre tract, referred to by petitioner (Br. for the United States, p. 10), is still pending in the United States District Court for the Northern District of Oklahoma, and there is no overlap between the claim in that case and the claims in this case. The relocation of certain transmission lines and the acquisition of certain flowage rights (*ibid.*) were settled by agreement between the Authority and the Government and are not included in this suit.

The claim which the Authority made before the Federal Power Commission, alluded to by petitioner (Br. for the United States, pp. 10-11), likewise has no effect on any of the claims in this case. There, the Authority requested the Commission to assess the United States and charge it for the benefits accruing to the Fort Gibson project from the storage and headwater improvements at the Pensacola project. The Federal Power Commission declined to entertain the petition on the ground that it was without jurisdiction, and the Court of Appeals for the Tenth Circuit affirmed. Fdg. 20, R. 126-27; *Grand River Dam Authority* v. *Federal Power Commission*, 246 F. 2d 453 (10th Cir., 1957).

est in the waters of the Grand River; and (2) the Court of Claims erred in holding that the Government's dominant navigation servitude did not apply to the waters of the Grand River, a non-navigable stream.

## SUMMARY OF ARGUMENT

### I

At the time of the taking by petitioner, respondent, by legislative grant from the State of Oklahoma, was vested with the absolute right to use and control all of the water power rights in the Grand River, a non-navigable stream, together with the exclusive franchise to develop the same. Session Laws of Oklahoma, 1935, Chap. 70 Art. 4, p. 350 *et seq.*; *City of Tulsa* v. *Grand-Hydro,* District Court of Mayes County, Okl., Pl. Ex. 1, R. 91 at R. 101; *Grand River Dam Authority* v. *Grand-Hydro,* 335 U.S. 359, 363, *affirming, Grand River Dam Authority* v. *Grand-Hydro,* 200 Okla. 157, 201 P. 2d 225.

The State of Oklahoma had the power and authority to appropriate to and vest in respondent all of the water power rights in the Grand River, together with the exclusive franchise and right to develop the same. The deed from the United States to the Cherokee Nation, dated December 31, 1838 and recorded in Misc. Vol. 478, pp. 733-41 of the General Land Office, Department of the Interior, Washington, D. C., divested the United States of all its right, title and interest, if any, in and to the waters of the Grand River. Thereafter, the United States never had any claim either to the lands embraced by the deed or to any of the waters in the non-navigable streams flowing through those lands.

In any event, to the extent that any right, title or interest to the water power rights in the non-navigable

streams in those lands may have remained in the United States following the deed to the Cherokee Nation in 1838, the control of these rights was expressly turned over to the new State of Oklahoma by the United States by virtue of § 25 of the Act of April 26, 1906, 34 Stat. 137, 146.

The Constitution of Oklahoma, which was approved by the United States (Proclamation of Statehood No. 6869, November 16, 1907), placed the "Arid States Doctrine" of water law in effect in Oklahoma, through which flowed the Grand River. The people of the State of Oklahoma, acting through their legislature, had the right and power to appropriate to and vest in respondent the water power rights and franchise rights which were taken and destroyed by petitioner. *Murphy* v. *Kerr*, 296 Fed. 536 (D.N.M., 1923), *affirmed*, 5 F. 2d 908 (8th Cir., 1925); *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 252. This it did in the Act creating respondent. *City of Tulsa* v. *Grand-Hydro*, *supra* at R. 101; *Grand River Dam Authority* v. *Grand-Hydro*, *supra* at 363.

The water rights which were taken here are not rights to unappropriated waters, as suggested by petitioner. (Br. for the United States, p. 35). All rights to the waters of the Grand River had been "appropriated to and vested in the Grand River Dam Authority" and others by the State of Oklahoma (*City of Tulsa* v. *Grand-Hydro*, *supra* at R. 101), and there were no unappropriated waters in the Grand River at the time respondent built its dam at Fort Gibson.

## II

The vested water rights of respondent in the Grand River are private property (*Federal Power Commission v. Niagara Mohawk Power Corp.*, *supra* at 246-47;

*Murphy* v. *Kerr, supra; Ickes* v. *Fox,* 300 U.S. 82, 95-96), and these property rights cannot be taken without payment of just compensation. *International Paper Co.* v. *United States,* 282 U.S. 399, 407; *United States* v. *Kelly* (reported with *United States* v. *Cress*), 243 U.S. 316.

Respondent's license and franchise is a property right, the taking of which also requires payment of just compensation. *International Paper Co.* v. *United States, supra* at 407; *Frost* v. *Corporation Commission,* 278 U.S. 515; *Jackson* v. *United States,* 103 F. Supp. 1019 (Ct. Cl., 1952); *United States* v. *Smoot Sand & Gravel Corporation,* 248 F. 2d 822, 828 (D.C. Cir., 1957). Indeed, this Court has required this very respondent, on an earlier occasion, to pay just compensation for the value of an exclusive right to develop a power site on the Grand River. *Grand River Dam Authority* v. *Grand-Hydro, supra.*

## III

Congress has manifested a clear policy, in the Reclamation Act, the Federal Power Act, and the Flood Control Act, to recognize and respect rights to the use of water vested or accrued under state law. See, e.g., *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725. During its consideration of the Flood Control Act of 1941 (which authorized federal construction of the Fort Gibson Dam) Congress recognized that respondent had exclusive franchise and water power rights in the waters of the Grand River.

The absence of any provision in the Flood Control Act of 1941 expressly indicating that rights vested under state law would not be recognized reflects an intention on the part of Congress that respondent be

compensated for its rights which were taken or destroyed by the construction of the Fort Gibson Dam.

## IV

In any event, the Constitution of the United States requires that just compensation be paid when property rights in the waters of a non-navigable stream are taken or destroyed. U. S. Const., amend. V; *United States* v. *Kelly, supra; United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799. This is to be distinguished from the situation in which property rights in the waters of a navigable stream are taken or destroyed. No compensation is required in the case of the navigable stream, since all who hold rights in navigable waters hold them subject to the dominant servitude of the United States. *United States* v. *Kansas City Life Ins. Co., supra.* Those who hold rights in and to the waters of a non-navigable stream are not subject to such a servitude, and where their property rights are taken, just compensation must be paid.

## V.

Petitioner cites no cases to support its suggestion that the United States may, without payment of just compensation, take property rights in the waters of a non-navigable stream because those waters "directly and substantially" affect navigation and commerce in a navigable river. To those who hold vested rights in the waters of non-navigable streams, there has been no "ample notice over the years" that their property "is subject to a dominant public interest." *Cf., United States* v. *Kansas City Life Ins. Co., supra* at 808. Adoption of the standard urged herein by petitioner would cause untold havoc in innumerable instances to holders of such vested property rights.

It cannot be denied that the United States has the *power* to take property rights in the exercise of its powers over commerce and navigation. U. S. Const. art. 1, § 8, cl. 3. But when the United States takes rights over which it does not have a dominant servitude, it is subject to the requirements of the Fifth Amendment, which imposes upon it an obligation to pay just compensation.

## ARGUMENT

### I

### The Right to the Use of the Waters in the Grand River Were Vested in Respondent by the State of Oklahoma and Those Waters Were Appropriated at the Time of the Taking Herein

A. *The Grant To Respondent.* Respondent was created by the Oklahoma Legislature for the development of hydro-electric power on the Grand River. Session Laws of Oklahoma, 1935, Chap. 70, Art. 4, p. 350 *et seq.* (Fdg. 4, R. 114). Among the powers, rights and privileges conferred upon respondent by the legislation creating it were the following:

> "(a) To control, store and preserve, within the boundaries of the District, the water of Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;
>
> (b) To develop and generate water power and electric energy within the boundaries of the District * * * " (Fdg. 5, R. 115).

The courts of the State of Oklahoma have considered this statute and have determined that:

> "[N]o person, firm, or corporation other than the Grand River Dam Authority has acquired since statehood the right to appropriate any of the waters of Grand River to a beneficial use; that Art. 4 of

> Chap. 70 of the 1935 Session Laws of the State of Oklahoma, which became effective on the 29th day of July, 1935, appropriated to and vested in the Grand River Dam Authority the absolute right to control, store and preserve the waters of Grand River for the purposes set forth in said Act * * * ". *City of Tulsa* v. *Grand-Hydro, supra* at R. 101.

This vesting and appropriation in respondent was expressly recognized by the Supreme Court of the State of Oklahoma in *Grand River Dam Authority* v. *Grand-Hydro,* 200 Okla. 157, 201 P. 2d 225; and by this Court in *Grand River Dam Authority* v. *Grand-Hydro,* 335 U.S. 359, 363.

B. *The Interest Of The State Of Oklahoma.* Petitioner does not challenge the fact that the State of Oklahoma granted to respondent the use and control of the waters in the Grand River. Petitioner instead appears to contend that the State of Oklahoma did not have an interest in the waters of the Grand River, and accordingly could not give any interest in these waters to respondent. (Br. for the United States, pp. 37-39).

So certain is petitioner that respondent cannot show State ownership of the waters used by the Fort Gibson dam, that it has flung down the gauntlet. "The critical element", petitioner contends, "is the federal character of the property within the State before it became a state. It is on the basis of that postulate that the respondent must somehow show a grant from the Federal Government" (Br. for the United States, p. 41).

Respondent accepts this challenge.

All of the Grand River lies within that part of Oklahoma which, prior to statehood, was known as the Cherokee Nation, which in turn was a part of Indian

Territory. These lands were originally a part of the Louisiana Purchase. By a series of treaties[5] between the United States and the Cherokee Nation of Indians, agreement was reached for the removal of a majority of the Cherokees from their native lands to the Territory that was later to become known as the Indian Territory. Mills, *Lands of the Five Civilized Tribes* (1919) at 25-26. For consideration, including the relinquishment of their right and claims to their native lands, the United States issued a Patent and Deed to the Cherokee Nation, granting and conveying forever an area of land described therein which included the lands through which the Grand River flows. By the specific terms of this Patent and Deed, issued on December 31, 1838, the Cherokee Nation was "to have and to hold the same together with all the rights, privileges, and appurtenances thereto belonging to the Cherokee Nation forever." (Recorded in Misc. Vol. 478, pp. 733-41, Records of the General Land Office, Dept. of Interior). See, Mills, *op. cit. supra* at 26-28.

The United States did not reserve any right, title or interest in or to the non-navigable waters within the area of land conveyed to the Cherokees.[6] In spite of later agreements between the Cherokee Nation and the United States, which diminished the acreage originally conveyed, the title to the lands, which included the Grand River, were never changed.

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[5] These treaties have been discussed in *Eastern Band of the Cherokee Indians* v. *United States*, 117 U.S. 288.

[6] Any implied reservation of the water rights was to the Indians, not to the United States. See, *United States* v. *Powers*, 94 F. 2d 783, 785 (9th Cir., 1938), *affirmed*, 305 U.S. 527; *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108, 116 n. 8 (D. Mont., 1958).

The Cherokee Nation, acting under the supervision of the United States Government, actively entered into and managed its affairs as a governmental entity until just prior to the time Oklahoma was admitted to statehood. By § 15 of the Act of March 3, 1893, 27 Stat. 612, the Cherokee Nation was authorized to allot the remaining lands which it held under the original Patent and Deed to its members in severalty; and subsequently, these lands, in fact, were so conveyed. See, Mills, *op. cit. supra* at 29. At no time did the lands which included the Grand River ever revert to the ownership or control of the United States; and at no time after the Patent and Deed of December 31, 1838 were any of the lands touching upon the Grand River in the public domain, nor were they public lands or federal non-"public" lands. (See, Br. for the United States, p. 41).

Here, then, is the "critical element", which petitioner has demanded as the "postulate" upon which the State's claim to ownership must be founded. Here is the direct chain of title, the "grant from the Federal Government", which petitioner has conceded is what is necessary to bear the burden of proving State ownership of the waters (See, Br. for the United States, p. 39).

The indisputable facts of history thus demonstrate that up to the time of Oklahoma's admission to statehood, the United States had divested itself entirely of any right, title or interest in and to the waters of the Grand River. To the extent that any right, title or interest to the waters in the non-navigable streams embraced by the lands of the Cherokee Nation may have remained in the United States, the control of these waters for power purposes was expressly turned over to the State of Oklahoma by the United States by

virtue of § 25 of the Act of April 26, 1906, 34 Stat. 137, "An Act to provide for the final disposition of the affairs of the five civilized tribes in the Indian Territory and for other purposes." Section 25 of that Act, which is set out in full as an Appendix to petitioner's brief, gave to power and light companies rights-of-way to build dams across non-navigable streams for the purpose of generating power.

The legislative history of this Act is illuminating. When it was originally introduced as H.R. 5976, 59th Cong., 1st Sess., it did not contain § 25. When the Bill reached the Senate, § 25 was placed into the Act. After some debate on the Senate floor (See 40 Cong. Rec. 3205), the all important proviso at the end of § 25 was offered as an amendment by Senator Clapp and was unanimously adopted. *Ibid.* That proviso read:

> "*Provided*, That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situat[illegible]"

The House approved the conference report (H. Rep. No. 2347, Vol. 1, 59th Cong., 1st Sess.) which recommended acceptance of § 25, as amended. It is plain from the legislative history of this Act that it was the intent of Congress that the future State of Oklahoma was to control the waters of non-navigable streams used in the production of power from dams placed across such streams.

C. *The Appropriated Waters of the Grand River.* Prior to admission to statehood, the Oklahoma Territory (as distinguished from the Indian Territory) was governed by a Territorial Legislature. See Organic Act of May 2, 1890, 26 Stat. 81 (contained in Okla.

Stat. Annot. (1952)). In one of the sessions of that Legislature (1905), there was adopted a series of Acts compiled in the statutes of the Oklahoma Territory under a chapter entitled "Irrigation". See historical note following § 3929 in the Compiled Laws of Oklahoma of 1909. This was the genesis of the "Arid States Doctrine" as it applies to Oklahoma. Most of these early statutes were carried forward when Oklahoma was admitted to statehood[7] and appear today in the Oklahoma Code Annotated, Title 82, and form a part of the "Water Code" of the State. This Water Code provides for the appropriation of water in non-navigable streams and establishes the machinery whereby such appropriation for beneficial use may be accomplished and adjudicated.

Under the Water Code, the State has asserted its right to control the manner in which the water of the State's non-navigable streams may be utilized. See, *Grand River Dam Authority* v. *Grand-Hydro*, 192 Okla. 693, 139 P. 2d 798.[8] The procedure it establishes is the law of Oklahoma; and it applies to all who seek

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[7] The Oklahoma Territory and the Indian Territory were admitted into the Union as the State of Oklahoma pursuant to the Enabling Act of June 16, 1906, 34 Stat. 267; the Constitution of the State was adopted by popular vote; the Proclamation of Statehood was issued (No. 6869, contained in Okla. Stat. Annot. (1952) Const., p. 405); and Oklahoma became a state on equal footing with the original states on November 16, 1907. Section 2 of the Schedule to the Oklahoma Constitution (Okla. Stat. Annot. (1952) Const., p. 583) provided that the laws in force in the Oklahoma Territory were to be carried forward and be in full force and effect at the moment of statehod.

[8] In *Murphy* v. *Kerr*, 296 Fed. 536 (D.N.M., 1923), *affirmed*, 5 F. 2d 908 (8th Cir., 1925), the Court said:

> "Water running in a natural stream belongs to the public. By statutory enactment the states of Arizona, Colorado, California, Montana, Nevada, New Mexico, *Oklahoma*, Oregon, North Dakota, South Dakota, Texas, Utah, Wyoming, and

the beneficial use of the waters of non-navigable streams.[9]

The legislation which created respondent, in practical effect, made an exception to the appropriation procedure provided by the Water Code. Instead of requiring respondent to follow the procedure outlined in the Water Code, the Oklahoma Legislature directly vested in respondent the right to the use of the waters of the Grand River. The courts of Oklahoma have so held. *City of Tulsa* v. *Grand-Hydro, supra* at R. 101.

The technique which the State of Oklahoma employed to vest in respondent the right to control, store and preserve the waters of the Grand River is without significance for purposes of this case. What is significant is that by the statute creating respondent, all of the rights to the use of the water in the Grand River were vested in respondent.

Thus, the water rights which were taken by petitioner, were *not* rights to *unappropriated waters*, as

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Idaho have declared in substance that all waters within the state are the property of the public, or belong to the state. The modern expression is that such waters are owned by the state in trust for the people." (Emphasis added). 296 Fed. at 540.

[9] Petitioner has set out, in a footnote at p. 30 of its brief, the full text of 60 Okla. Stat. Annot. (1949), Sec. 60, for the purpose, apparently, of indicating that the appropriation doctrine in Oklahoma is not entirely pure. Whether or not this is so seems entirely irrelevant. See, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725.

It is also irrelevant that the State of Oklahoma may have changed from the riparian doctrine to the appropriation doctrine at or about the time of its Admission to Statehood (See, Br. for the United States, pp. 41-42). Certainly, a change from the riparian to the appropriation doctrine could not have operated to divest the federal government of its riparian rights (See, Br. for

petitioner suggests (Br. for the United States, p. 35). At the time petitioner built its dam at Fort Gibson, all rights to the waters of the Grand River had been appropriated and were actually being put to beneficial use. In consequence, and contrary to the contentions of petitioner, the only issue in this case is as to waters which have been appropriated.

* * * * *

It is respectfully submitted that the State of Oklahoma had the power and the authority to, and in fact did, appropriate to and vest in respondent all of the water rights in the Grand River, together with the exclusive franchise and right to develop the same; and that, at the time of the taking by petitioner herein, the waters of the Grand River at the Fort Gibson site were appropriated waters under the absolute control of respondent.

II

**The Vested Water and Franchise Rights in the Grand River Were the Private Property of Respondent at the Time of the Taking Herein and Just Compensation Must Be Paid**

A. *The Water Rights.* The holdings of this Court, as well as the uniform holdings of other courts, make it plain that rights to the use of running water are determined by state law. See, e.g., *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, where this Court said: "[W]ater rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that

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the United States, p. 41) since, as the history set out at pp. 12-13, *supra*, indicates, the federal government had no riparian rights to be divested of. Furthermore, there would be nothing to preclude Oklahoma from changing from one doctrine to the other. See *Baumann* v. *Smrha*, 145 F. Supp. 617, 624 (D. Kan., 1956) (and cases cited), *affirmed*, 352 U.S. 863.

law." 347 U.S. at 252; accord, *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 742; *Ickes* v. *Fox*, 300 U.S. 82, 95; *Hardin* v. *Jordan*, 140 U.S. 371; *Murphy* v. *Kerr*, 296 Fed. 536, 540 (D. N.M., 1923), *affirmed*, 5 F. 2d 908 (8th Cir., 1925); *Rank* v. *Krug*, 90 F. Supp. 773, 786 (S.D. Cal., 1950) and cases cited at 785.

This Court has recognized on innumerable occasions that where state law grants a property right in and to the use of waters of a running stream, such a property right must be recognized in determining just compensation for the taking thereof. *International Paper Co.* v. *United States*, 282 U.S. 399, 407; *United States* v. *Kelly*, 243 U.S. 316; *Federal Power Commission* v. *Niagara Mohawk Power Corp., supra.* And this principle does not depend upon whether the right to use the waters of a running stream is acquired by virtue of the riparian doctrine (*Federal Power Commission* v. *Niagara Mohawk Power Corp., supra*) or under the doctrine of appropriation (*Ickes* v. *Fox, supra*) or, indeed, by a mixture of the two. *United States* v. *Gerlach Live Stock Co., supra.* It is the right to the use of the waters which is recognized, and the legal basis upon which the right may have been acquired is quite irrelevant.

It is clear from the discussion in Part I, pp. 10-14, *supra*, that respondent was vested, by the State of Oklahoma, with the right to the use and control of the waters in the Grand River; and that the State of Oklahoma had the power and authority to vest these water rights in respondent. And there is an unequivocal declaration by the Oklahoma courts that the waters in question were in fact appropriated to and vested in the Grand River Dam Authority. *City of Tulsa* v. *Grand-Hydro, supra* at R. 101. In conse-

quence, there can be no doubt that respondent had vested water rights in the Grand River at the time the United States built the Fort Gibson Dam, and that the construction of that Dam took or destroyed the private property of respondent, thus entitling it to just compensation.

This issue has long been settled and certainly seems foreclosed by this Court's decision in *International Paper Co.* v. *United States, supra.* In that case, it will be recalled, the International Paper Company had been authorized, pursuant to the law of the State of New York, to draw a portion of the flow of the Niagara River from a still larger diversion authorized to the Niagara Falls Power Company. During World War I, the Secretary of War directed the Power Company to take all of the flow and utilize energy therefrom for certain named companies whose work was deemed more useful for national defense purposes than that of the Paper Company. The consequence was that the Paper Company lost its rights to that portion of the flow of the River which it had had theretofore. This Court, in holding that the Paper Company was entitled to just compensation, expressly noted:

> "The petitioner's right was to the use of the water; and when all the water that it used was withdrawn * * * and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use." 282 U.S. at 407.

No valid distinction can be made between what occurred in the *International Paper Co.* case and what has occurred here. "There is no room for quibbling distinctions". 282 U.S. at 407. Respondent's "right

was to the use of the water" at the Fort Gibson site; and when all of this water which respondent was entitled to use was taken from it by the Government, "it is hard to see what more the Government could do to take the use." *Ibid.* As in *International Paper Co.*, respondent here was deprived of a valuable property right for which it is entitled to just compensation.

B. *The Franchise Rights.* There is no dispute that respondent held a franchise from the State of Oklahoma to develop and generate electric power and energy at the Fort Gibson site. There is also no dispute under the decisions of this Court, and the decisions of other courts, that such a franchise or license is a property right for the taking of which compensation must be paid. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312[10]; *Frost* v. *Corporation Commission*, 278 U.S. 515; *International Paper Co.* v. *United States*, 282 U.S. 399; see also *Jackson* v. *United States*, 103 F. Supp. 1019 (Ct. Cl., 1952); *cf.*, *Southern Counties Gas Co.* v. *United States*, 157 F. Supp. 934 (Ct. Cl., 1958), *cert. denied*, 358 U.S. 815.

This specific issue has already been determined for all practical purposes by this Court. In *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, this Court had before it a dispute between the present

[10] The language of the court in the *Monongahela* case is particularly appropriate to the instant case:

> "And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the navigation company has been receiving. It would seem strange that if, by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls,

respondent and Grand-Hydro, a private corporation which had been given a state license to appropriate the waters of the Grand River for the development of hydro-electric power. After the license had been granted to Grand-Hydro, the Oklahoma Legislature created the Grand River Dam Authority, respondent herein, and granted to it the exclusive authority to develop the Grand River. This Court observed that "In effect, the petitioner [the Authority] thus acquired a state priority over the respondent [Grand-Hydro], although the respondent held title to certain water rights and to the land needed for the project." 335 U.S. at 363. The specific issue before this Court in the *Grand-Hydro* litigation was whether, in determining the value of certain land which the Authority had taken over from Grand-Hydro, it was appropriate to consider the value of that land for power site purposes. This Court affirmed the decision of the Supreme Court of Oklahoma which had held that it was necessary to consider the value of the land as a power site.

This Court has thus settled the issue of whether a permit or franchise to generate electric power and energy from the waters of the Grand River is a property right; and certainly, this property right is no different when it belongs to the Grand River Dam Authority than when it belonged to Grand-Hydro.

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and having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same tolls. In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice." 148 U.S. at 337-38.

Petitioner argues that the claim for the value of the franchise right does not give rise to a right of compensation since it "is no more than a claim that a prospective business opportunity was lost" (Br. for the United States, p. 34), and only "a hope or expectancy" was destroyed (Br. for the United States, p. 28). But this argument disregards the established facts of record. While concededly respondent had not begun physical construction of the Fort Gibson project before petitioner built the project, it had taken many of the steps preliminary thereto. It had developed a comprehensive plan in which the Fort Gibson project played an important role. It had constructed and placed in operation the Pensacola unit which was the largest and the key unit to the operation of the units downstream. It had acquired lands, easements, and rights-of-way, and had constructed transmission lines, substations and facilities to intercommunicate the Fort Gibson project with the Pensacola project and the Markham Ferry project. (Pp. 3-4, *supra*).

By the time of the taking herein, respondent had already been making beneficial use of the water rights in the Grand River, had developed and had in operation a going concern, had pledged the revenues from the water rights and franchise rights in the Grand River for the payment of revenue bonds, and had spent millions of dollars in providing facilities to make beneficial use of the water and franchise rights.

It is hardly appropriate to characterize the Authority's loss as being one of "prospective business opportunity", or the destruction of "a hope or expectancy". Respondent's loss was exactly what the Court of Claims held it to be—that of "property

rights which could not be taken without just compensation". (R. 109).

In any event, a similar argument was made and rejected in the *Grand-Hydro* case, *supra*. There it was contended that since Grand-Hydro had not procured a license from the Federal Power Commission, the rights granted to it by the State had not become sufficiently real to justify payment for its claimed franchise right. 335 U.S. at 372. This argument was rejected by the Supreme Court of Oklahoma and by this Court. *Ibid.* The *Grand-Hydro* case thus stands with other decided cases, *supra*, as holding that the franchise right to harness the waters of a flowing stream in order to produce electric power is a property right entitled to the protection of the Fifth Amendment.[11]

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[11] Petitioner refers to certain sections of the Act establishing the Grand River Dam Authority and suggests that this Act contemplated that the development of the dams on the Grand River would be a cooperative effort of the Authority and the United States (Br. for the United States, p. 34, n. 17). From this it concludes that the federal construction of the Fort Gibson project did not frustrate either the state or federal objectives.

Petitioner, however, misconstrues the language of § 862(c) (set out in Br. for the United States at p. 4). The so-called "cooperative language" was solely for the purpose of insuring that the operation of the dams for flood control purposes would be done under the supervision of the Corps of Engineers. This in fact was provided for in the licenses issued by the Federal Power Commission for the operation of the Pensacola and Markham Ferry projects (Fdg. 8(c), R. 119; Fdg. 22, R. 129-31).

## III

**In the Flood Control Act of 1941, Congress Manifested No Intention to Depart From Its Long Established Policy to Recognize and Respect Rights to the Use of Water Vested Under State Law**

Nothing contained in the Flood Control Act of 1941, which provided for the construction of the Fort Gibson Dam, indicates an intention by Congress to depart from its well established policy to recognize and respect rights to the use of water vested or accrued under state law.

In § 8 of the Reclamation Act of June 17, 1902, 43 U.S.C. 383, 32 Stat. 390, Congress expressly provided:

> "Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water * * * or any vested right acquired thereunder * * *."

Similarly, in Section 27 of the Federal Power Act of June 10, 1920, 16 U.S.C. 821, 41 Stat. 1077, Congress expressly provided:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water * * * or any vested right acquired therein."

Finally, in the Flood Control Act of December 22, 1944, 33 U.S.C. 701-1, 58 Stat. 887, Congress expressly provided:

> "* * * [I]t is declared to be the policy of the Congress to recognize the interests and rights of the States * * * to preserve and protect to the

fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers * * *."

These Acts—all dealing with problems relating to reclamation, the generation of power, and flood control—manifest a deep rooted concern on the part of Congress with respect to rights vested under the laws of any state. A reversal of this policy should not be lightly imputed.

Although Congress did not expressly set forth a declaration similar to those quoted above when it enacted the Flood Control Act of 1941, it did indicate that the Fort Gibson Dam was to be constructed in accordance with House Document 107 of the 76th Congress, First Session. That Document clearly indicated a recognition by Congress that the State of Oklahoma had established respondent and had granted to it rights with respect to the development and sale of power from the Grand River. So, for example, the Chief of Engineers, stated:

"* * * Local interests desire construction of reservoirs on the lower Grand (Neosho) River at the Pensacola, Markham Ferry and Fort Gibson sites for the production of hydroelectric power and for flood control. The desired improvements, particularly with respect to the development of water power, are proposed by the State of Oklahoma which, through legislative enactment, has created a Conservation and Reclamation District known as the Grand River Dam Authority, this authority established primarily for the development and sale of power from improvements on Grand River. * * *" House Doc. No. 107, 76th Cong., at p. 103.

The same Document further stated:

> "* * * It is noted that development of the Pensacola site for power development and flood control is planned by the Grand River Dam Authority, a Conservation and Reclamation District, created by the State of Oklahoma primarily for the development and sale of power from the Grand River. The work is being financed by a loan and grant obtained from the Federal Emergency Administration of Public Works." House Doc. No. 107, 76th Cong., at p. 104.

And the District Engineer reported:

> "In 1935 the State of Oklahoma created the Grand River Dam Authority. Legally this Authority has the right to issue bonds for the construction of power development on Grand River, but the Act prohibited the Authority from distributing power to the consumer. The 1937 Oklahoma Legislature removed this restriction. The Authority has been actively interested in this project and obtained, through the National Resources Committee, a report on the social and economical aspects of the Pensacola project, together with a preliminary analysis of the power market applicable to this project. Said report was published as Flood Control Committee Document No. 4, 74th Congress, 1st Session. Its general tenor was favorable. A loan and grant has been made by the Public Works Administration to the Grand River Dam Authority for the development of the Pensacola project." House Doc. No. 107, 76th Cong., at p. 9.

Accordingly, it seems clear that when Congress authorized the construction of the Fort Gibson dam in the Flood Control Act of 1941, it did so with the knowledge that this respondent held the franchise and water power rights to develop the water power

of the Grand River and that respondent had actually completed one of the units (Pensacola).

Moreover, Congress has also recognized and compensated the City of Muskogee, Oklahoma, for water rights in the Grand River which were destroyed or damaged as a result of the construction of the Fort Gibson Dam. Act of August 26, 1954, Public Law 663, 83rd Congress, 63 Stat. 822.[12]

Under the expressed policy of Congress as set out in the Reclamation Act, the Federal Power Act and the Flood Control Act—and there being nothing to the contrary in the Flood Control Act of 1941—it is not inappropriate to attribute to Congress an intention that respondent would be compensated for any of its vested rights which were destroyed or damaged as a result of the construction of the Fort Gibson Dam.

## IV

### Petitioner Must Pay Just Compensation for the Property Rights It Has Taken From Respondent

The question presented in this case is whether respondent's vested water and franchise rights, acquired under state law, in a non-navigable stream can be taken or destroyed by the United States without the payment of just compensation.

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[12] Public Law 663, Chap. X, p. 22, states:

"For contribution to the City of Muskogee toward the construction of a water supply pipeline from existing city water supply intake on Grand River near its junction with the Arkansas River to Fort Gibson dam, in settlement of all *damages to the water supply* of the City of Muskogee, on account of the construction and operation of Fort Gibson Reservoir, $200,000.00 out of funds previously appropriated." (Emphasis added).

Preliminarily, it should be noted that respondent concedes that the United States has the *power*, under the Commerce Clause of the Constitution, to take or destroy water rights in non-navigable streams, including those which respondent has in the Grand River. But the issue in this case is not one of *power*, but rather of *compensation*. And respondent strenuously contends—and the Court of Claims has held—that when the United States exercises its power to take property rights in non-navigable streams, it can do so only upon payment of just compensation.

The holding of the Court of Claims on this question is neither novel nor new; on the contrary, it is entirely consistent with established decisions. *United States* v. *Kelly* (reported with *United States* v. *Cress*), 243 U.S. 316; *Iowa-Wisconsin Bridge Co.* v. *United States*, 84 F. Supp. 852, 857, 867 (Ct. Cl., 1949), *cert. denied*, 339 U.S. 982; see, *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108, 112 (D. Mont., 1958).

In the *Kelly* case, this Court held that where the United States, by the erection of a dam on a navigable river, affected the flow of water in a non-navigable tributary so as to make it impossible to operate the respondent's mill, it was required to pay just compensation. This case is even stronger than *Kelly*. In *Kelly*, the Government's activities were confined to navigable waters but affected respondent's property in the non-navigable tributary. Here, by contrast, the Government's activities were themselves in the non-navigable river and directly destroyed respondent's rights. If the payment of just compensation

was necessary in the *Kelly* case, it is *a fortiori* required here.[13]

The distinction between what the Government may take without compensation and what it may take only upon payment of just compensation, has been, we submit, plainly delineated in this Court's decisions. The governing principal is that water rights in navigable streams are inferior to, and subject to, the superior navigation easement of the federal government; and thus, such water rights may be taken or destroyed by the Government without compensation. *United States* v. *Chandler-Dunbar Water Power Company*, 229 U.S. 53; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288; *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377.

The touchstone in all of these cases is the paramount servitude of the federal government. This

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[13] Petitioner's efforts to attenuate the holding in the *Kelly* case (Br. for the United States, pp. 26-28) are ingenuous but unavailing. Despite its suggestion that the decision has all but been overruled (Br. for the United States, p. 27), this Court has expressly declined to do so. *United States* v. *Willow River Power Co.*, 324 U.S. 499, 506-07.

That *Kelly* involved an award of only $1,500 (Br. for the United States, p. 26), does not make it any the less binding since constitutional principles plainly do not vary with the amount of money involved.

And that Kelly was a riparian owner does not make his position stronger than respondent's here. Respondent's right to the use of the waters of the Grand River were vested under the law of Oklahoma and are entitled to the same constitutional protection as Kelly's rights which were derived under the law of Kentucky.

The suggestion that Kelly's mill had been in operation when its utility was destroyed by the United States and that respondent here had only "a hope or expectancy" (Br. for the United States, pp. 27-28) is a distinction which does not comport with the facts of record in this case (pp. 21-22, *supra*).

servitude is limited to the bed and banks of navigable streams, and properties within the bed and banks of navigable streams may therefore be taken or destroyed without compensation. But the superior right of the United States has never been held to extend *beyond* the bed and banks of the navigable streams, and when property outside the bed and banks of navigable streams is taken, just compensation must be paid.

This proposition has been very clearly expressed by Justice Burton, speaking for the Court, in *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799:

> "It is not the broad constitutional power to regulate commerce, but rather the servitude, derived from that power and narrower in scope, that frees the Government from liability in these cases. When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. See Gould on Waters, c. IV, §§ 86-90 (1883); I Farnham, Waters and Water Rights, c. III, § 29 (1904). This has applied to the stream and to the land submerged by the stream. There thus has been ample notice over the years that such property is subject to a dominant public interest. This right of the public has crystallized in terms of a servitude over the bed of the stream. The relevance of the high-water level of the navigable stream is that it marks its bed. *Accordingly, it is consistent with the history and reason of the rule to deny compensation where the claimant's private title is burdened with this servitude but to award compensation where his title is not so burdened.*" (Emphasis added). 339 U.S. at 808.

Since the Grand River is concededly a non-navigable stream, under the criterion set forth in the *Kansas City Life Ins. Co.* case, its bed and banks were not burdened with a dominant servitude running to the United States. In consequence, at the time respondent was vested with all of the water power and franchise rights in the Grand River at the Fort Gibson site, its property interests were not burdened by any federal servitude. It follows then that when the United States constructed the Fort Gibson project, it could not avail itself of the servitude which it could have only on a navigable river. Though it had the power to take respondent's water and franchise rights, it could take them only subject to the limitations imposed by the Fifth Amendment.

Contrary to petitioner's contention (Br. for the United States, p. 18), it has no "federal prerogatives" by virtue of its "commerce power". The commerce power gives it only a paramount servitude over the bed and banks of a *navigable* river; it gives no servitude over the bed and banks of a *non-navigable* river. And absent the servitude, the taking by petitioner is a taking subject to the Fifth Amendment and only upon payment of just compensation.

## V

### There Is No Support in the Cases for Petitioner's Claim That Its Dominant Servitude Extends to Non-Navigable Rivers, and Adoption of That Standard by This Court Can Cause Havoc With Vested Property Rights

Petitioner apparently recognizes that it cannot prevail in this case under established law. Perhaps this recognition accounts for petitioner's assertion that the question is "not whether the Grand River is navigable but whether it directly and substantially affects

navigation and commerce in the Arkansas River Basin." (Br. for the United States, p. 13; see also, p. 20). Such audacity is rare even for the Government—it is an effort to extend its dominant servitude, hitherto limited to the bed and banks of a navigable river, into non-navigable tributaries of those rivers.

Petitioner does not—and indeed cannot—cite any cases to support this extraordinary assertion. The decision in *United States* v. *Twin City Power Co.*, 350 U.S. 222, is, as petitioner concedes (Br. for the United States, p. 19), a decision which deals with a *navigable* river (the Savannah River). Petitioner also concedes that the Court of Claims found this distinction significant. *Ibid.* It is to be noted that the Court of Claims is not alone in this regard. See, *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108 (D. Mont., 1958), where the Court said: "It is my opinion that the rule of Twin City Power Co. case would in any event be limited in its application to a navigable stream." 162 F. Supp. at 116.

The decision in *United States* v. *Rio Grande Irrigation Co.*, 174 U.S. 690, is completely irrelevant to petitioner's assertion. In that case, the Attorney General of the United States, acting pursuant to a federal statute (which made it a criminal offense to create an obstruction "to the navigable capacity of any waters, in respect to which the United States has jurisdiction," and which authorized proceedings in equity to enjoin such obstructions), sought to enjoin a private company from constructing a dam across the Rio Grande River in the territory of New Mexico on the ground that such appropriation by the defendant would substantially interfere with the navigable capacity of the river in the downstream areas. This Court merely

sustained the right of the federal government to proceed in that fashion. No claim for compensation was involved.

*Oklahoma* v. *Atkinson*, 313 U.S. 508, is the other side of the coin. In that case, the state of Oklahoma sought to enjoin the construction of the Denison Dam on the Red River. The sole question determined by this Court in that case was that the Dam could be constructed pursuant to the power of the federal government to regulate commerce and navigation. Significantly, the opinion by Mr. Justice Douglas, for an unanimous Court, specifically pointed out:

> "There is no complaint that any property owner will not receive just compensation for the land taken." 313 U.S. at 534.

The reliance placed by petitioner on *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359, is equally unavailing. It is significant that petitioner does not rely upon this Court's opinion in that case, but rather upon what petitioner there unsuccessfully asserted in its brief (Br. for the United States, pp. 22-25) and what the minority of the Court wrote in dissent (*Id.* at 25-26). We have discussed the *Grand-Hydro* case in detail (pp. 20-23, *supra*), and it is readily apparent that the *Grand-Hydro* case did not and indeed could not have determined the right of the United States to the waters of non-navigable streams, since no rights of the United States were involved in that case.[14]

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[14] The observation in the majority opinion that "The United States enjoys special rights and power in relation to navigable streams, and also to streams which affect interstate commerce" (335 U.S. at 373), was unnecessary to the decision of the case and is hardly support for petitioner's contention.

The fact of the matter is that never before has it been held that the federal government can take water rights in a *non-navigable* stream without paying compensation therefor. To embrace petitioner's audacious suggestion would be to wreak, in innumerable instances, untold havoc to holders of vested property rights and to open a Pandora's box of unending trouble. The test petitioner suggests (i.e., directly and substantially affecting navigation and commerce) would encompass almost any non-navigable stream. And, while it may not be important for this Court to concern itself with the vested rights which may exist on "every rivulet, creek, and stream" (*cf.*, Br. for the United States, pp. 23-24 n. 9), what of the rights which have vested in the more substantial, but nevertheless non-navigable, waters throughout the United States? In Oklahoma alone, the application of this doctrine would mean that the federal government could take and destroy the water rights of such cities as Tulsa and Muskogee, and of towns such as Fort Gibson, Wagoner and Pryor Creek (all determined in *City of Tulsa* v. *Grand-Hydro*, R. 91), without paying just compensation.

It is difficult to believe that the framers of our Constitution intended to immunize the federal government from the reach of the Fifth Amendment by such an extraordinary extrapolation of the commerce power.

It is not amiss to turn again to this Court's decision in *United States* v. *Kansas City Life Ins. Co.*, *supra*. There, it will be recalled, this Court justified the exercise of the Government's dominant servitude by noting that "[t]here thus has been ample notice over the years that such property is subject to a

dominant public interest." 339 U.S. at 808. But that was written with respect to the Government's rights over *navigable* waters. Not until the instant case has there ever been a claim by the federal government that its dominant servitude extended to the waters of *non-navigable* streams. There has been no "ample notice over the years" to the holders of vested water rights in non-navigable streams that their property "is subject to a dominant public interest." The standard now urged by petitioner is a belated, unjustified, unwarranted and utterly illegal effort to elude its constitutional obligation to make just compensation.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below should be affirmed.

Q. B. Boydstun
P. O. Drawer 112
Vinita, Oklahoma

Jess Larson
1000 Connecticut Ave., N. W.
Washington 6, D. C.

*Attorneys for Respondent.*

Ford, Larson, Greene & Horan
1000 Connecticut Ave., N. W.
Washington 6, D. C.

Alan Y. Cole
815 15th Street, N. W.
Washington 5, D. C.

*Of Counsel*